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## THE GOOD NOTARIO: EXPLORING LIMITED LICENSURE FOR NON-ATTORNEY IMMIGRATION PRACTITIONERS

JEAN C. HAN\*

### I. INTRODUCTION

THE United States is home to more than 22 million non-citizens who, at one point or another in their lives, have been or will be in need of immigration legal assistance.<sup>1</sup> Much has been written about the need for high-quality legal representation for immigrants.<sup>2</sup> Still more has been written about the unauthorized practice of law (UPL) by non-attorney immigration professionals,<sup>3</sup> advocating for the passage of UPL statutes and

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1. See Michael D. Nicholson, *The Facts on Immigration Today: 2017 Edition*, CENTER FOR AMERICAN PROGRESS (April 20, 2017, 9:00 AM), <https://www.americanprogress.org/issues/immigration/reports/2017/04/20/430736/facts-immigration-today-2017-edition/> [https://perma.cc/7JLF-SXC9]; U.S. CENSUS BUREAU, *Selected Characteristics of the Native and Foreign-Born Populations: 2015 American Community Survey 1-Year Estimates*, U.S. DEP'T. OF COMMERCE (2015), [https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_15\\_1YR\\_S0501&prodType=table](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_15_1YR_S0501&prodType=table) [https://perma.cc/XJY2-WFQ9]. Even U.S. citizens may require immigration legal assistance; for example, a citizen is permitted to petition for certain family members to come to the United States and become lawful permanent residents.

2. See, e.g., Deborah L. Rhode, *Access to Justice: A Roadmap to Reform*, 41 *FORDHAM URB. L.J.* 1227, 1258 (2014); Elinor R. Jordan, *What We Know and Need to Know about Immigrant Access to Justice*, 67 *S.C. L. REV.* 295, 328 (2016); Sabrineh Ardalani, *Access to Justice for Asylum Seekers: Developing an Effective Model of Holistic Asylum Representation*, 48 *U. MICH. J.L. REFORM* 1001 (2015).

3. See, e.g., Joseph M. Gietl, *Like Lambs to the Slaughter: How Unregulated Immigration Practitioners Harm Immigrants*, 19 *PUB. INT. L. REP.* 66 (2013-2014); MARGARET MIKYUNG LEE, CONG. RESEARCH SERV., R40822, *LEGAL ETHICS IN IMMIGRATION MATTERS: LEGAL REPRESENTATION AND UNAUTHORIZED PRACTICE OF LAW* 1-2 (2009). See generally Mark E. Steiner, *Using Consumer Law Against Notorious Notarios*, 22 *J. CONSUMER & COM. L.* 11 (2018); Lauren A. Fisher Flores, *Protecting the Vulnerable Among Us: Notario Fraud and a Private Right of Action under the Texas DTPA*, 19 *J. CONSUMER & COM. L.* 28 (2015).

the prosecution of *notarios*.<sup>4</sup> The spotlight has been placed almost singularly on the provision of legal representation by attorneys. That approach, while well intended, is not responsive to the facts on the ground. This Article looks at the other side of the equation: exploring the potential of harnessing an existing resource—*notarios*—and employing limited licensing in the immigration law context. Only by examining the reality of the situation as it currently exists can we truly begin to address the problem of immigrants' access to justice on a larger, more effective scale.

## II. DUAL PROBLEMS

### A. *The Unmet Need for High-Quality Legal Representation for Immigrants*

The demand for immigration legal services is great. In the last forty years, the foreign-born population of the United States has risen from 9.6 million, or 4.7% of the total population in 1970, to 40 million, or 12.9% of the total population, in 2010.<sup>5</sup> Twenty-two million of those 40 million are non-citizens who have needed or will need immigration legal services at some point in their lives.

#### 1. *The Demand*

Immigrants in this country are confronted with an extraordinarily complex body of law, derived not only from the Immigration and Nationality Act, but also from numerous regulations in the Code of Federal Regulations, and any number of judicial decisions from the Board of Immigration Appeals or any of the Federal Circuit Courts of Appeals, agency opinions, chief immigration judge memoranda, and other policy decisions. And any of these policies could change at any moment due to the whims of politics. The combination of these sources of law and policy make the field more fluid and unstable. In the words of Judge John T. Noonan, who served on the United States Court of Appeals for the Ninth Circuit for more than thirty years, “with only a small degree of hyperbole, immigration laws have been termed ‘second only to the Internal Revenue Code in complexity.’”<sup>6</sup>

On top of the law, immigrants must also deal with a large number of federal agencies that all have their hands in the immigration process, from the Department of Homeland Security, with U.S. Citizenship and Immigration Services (USCIS), Immigration and Customs Enforcement (ICE), and Customs and Border Protection (CBP) within it; to the Department of Justice (DOJ), with the Executive Office for Immigration Review (EOIR)

4. For a discussion of the term “*notario*,” see *infra* notes 21–38 and accompanying text.

5. See *Census of Population, 1850 to 2000, and The American Community Survey, 2010*, U.S. CENSUS BUREAU, (2010), [https://www.census.gov/newsroom/pdf/cspan\\_fb\\_slides.pdf](https://www.census.gov/newsroom/pdf/cspan_fb_slides.pdf) [<https://perma.cc/GQ4L-SM5E>].

6. See *Castro-O’Ryan v. U.S. Dep’t of Immigration & Naturalization*, 821 F.2d 1415, 1419 (9th Cir. 1987) (citations omitted).

and the Board of Immigration Appeals within it; to the Department of Labor; and the Department of State.

In short, immigrants to the United States must navigate an unusually complex body of law administered by a confusing array of government actors to successfully obtain immigration status for themselves or their loved ones. And the governing sources of law, and the agencies responsible for administering them, vary depending on the kind of relief the immigrant seeks. This can range from applying for permission to work, to petitioning for a family member to come to the United States, to applying for Special Immigrant Juvenile Status, to applying for asylum, to naturalizing and becoming a U.S. citizen. Along the way, immigrants must fill out forms, document the minutiae of their lives, and interpret the law—often with only a limited grasp of the English language.

A wrong step in this process can carry severe consequences. Immigrants stand to lose time, money, employment opportunities, and immigration status. In the worst case scenario, they lose the right to remain in the United States, leading to removal and long-term separation from their families and loved ones.

Studies confirm what common sense would suggest—that having representation when one seeks immigration relief makes a dramatic difference. Ingrid Eagly and Steven Shafer’s groundbreaking national study of access to counsel in immigration court demonstrates just how much: an immigrant with representation is 15 times more likely to seek relief and 5.5 times more likely to obtain it than an immigrant without representation.<sup>7</sup>

Many scholars, practitioners, and judges have written about the unmet need for immigration legal services. For years, Judge Robert Katzmann has decried the “crisis” in legal representation for immigrants that he sees every day as a federal judge.<sup>8</sup> In calling for more judicial discretion in deportation cases, Justice John Paul Stevens has observed that “the need for legal representation for immigrants is really acute.”<sup>9</sup> Many, including Judge Katzmann, have noted the large numbers of immi-

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7. See Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 1, 57 (2015).

8. See Robert A. Katzmann, *When Legal Representation is Deficient: The Challenge of Immigration Cases for the Courts*, 143 DAEDALUS 37, 37 (2014); *Our Story*, IMMIGRANT JUSTICE CORPS, <http://justicecorps.org/our-story/> [https://perma.cc/GG8F-Q285] (last visited Jan. 22, 2019).

9. “‘The need for legal representation for immigrants is really acute,’ Mr. Stevens said. He urged the audience to push for Congress to grant state and federal judges discretion in deportation cases because, he said, ‘the consequences are just so drastic.’” Sam Dolnick, *As Barriers to Lawyers Persist, Immigrant Advocates Ponder Solutions*, N.Y. TIMES, May 3, 2011, [http://www.nytimes.com/2011/05/04/nyregion/barriers-to-lawyers-persist-for-immigrants.html?\\_r=0](http://www.nytimes.com/2011/05/04/nyregion/barriers-to-lawyers-persist-for-immigrants.html?_r=0) [https://perma.cc/LY2U-HCMX] (quoting Justice John Paul Stevens).

gration cases at the federal appellate level—a place they land only after two rounds of agency review.<sup>10</sup>

The dearth of legal representation in the immigration context is particularly acute among detained immigrants; in New York, for example, only about 40% of detained immigrants have lawyers.<sup>11</sup> As dire as that sounds, detained immigrants fare far worse elsewhere. Eagly and Shafer's study documents that immigrants detained in large cities (with populations of 600,000 or more) were represented 17% of the time, while immigrants detained in small cities (with populations up to 50,000) were even less likely to obtain counsel, only 10% of the time.<sup>12</sup>

## 2. *The Supply*

As one scholar-practitioner has observed, "Asking why there are not enough lawyers in a nation that has more attorneys than any other country in the world may seem like a peculiar question."<sup>13</sup> Yet it is a question we inescapably must confront. The leading national bar association for immigration lawyers, the American Immigration Lawyers Association (AILA) has approximately 15,000 members, meaning that there is one AILA attorney for every 21,900 inhabitants in the United States.<sup>14</sup> Even limiting ourselves to the foreign-born population of the United States leaves only one

10. Appeals of immigration cases from the Board of Immigration Appeals accounted for 86% of administrative agency appeals and constituted the largest category of administrative agency appeals in each federal circuit except the D.C. Circuit in the year ending March 31, 2018. See UNITED STATES COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 2018, <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2018> [<https://perma.cc/J4LF-NAGW>] (last visited Jan. 23, 2019); see also Adam Liptak, *Courts Criticize Judges' Handling of Asylum Cases*, N.Y. TIMES, Dec. 26, 2006, [http://www.nytimes.com/2005/12/26/us/courts-criticize-judges-handling-of-asylum-cases.html?\\_r=0](http://www.nytimes.com/2005/12/26/us/courts-criticize-judges-handling-of-asylum-cases.html?_r=0) [<https://perma.cc/CZB2-UE7M>].

11. Dolnick, *supra* note 9.

12. Eagly & Shafer, *supra* note 7, at 38. Drawing on data from over 1.2 million deportation cases decided between 2007 and 2012, the authors found that only 37% of all immigrants, and a mere 14% of detained immigrants, secured representation.

13. See Careen Shannon, *To License or Not to License? A Look at Differing Approaches to Policing the Activities of Nonlawyer Immigration Service Providers*, 33 CARDOZO L. REV. 437, 443 (2011). Even beyond the immigration-specific context, federally-funded legal aid organizations lack the resources to fully serve the civil legal problems of low-income individuals. See Legal Services Corporation, *The Justice Gap Report: Measuring the Unmet Civil Needs of Low-Income Americans* 30 (June 2017) (explaining that 41% of civil legal needs are not addressed).

14. "AILA is the national association of more than 15,000 attorneys and law professors who practice and teach immigration law." ABOUT, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, <https://aila.org/about> [<https://perma.cc/9KFS-K2Q5>] (last visited Jan. 23, 2019). The U.S. Population is currently estimated at 328,500,000. See U.S. AND WORLD POPULATION CLOCK, [www.census.gov/popclock/](http://www.census.gov/popclock/) [<https://perma.cc/7ZL2-BYHB>] (last visited Jan. 23, 2019). Careen Shannon noted, at the time of her writing in 2011, that AILA had approximately 10,310 members, with one AILA attorney for every 29,946 U.S. inhabitants. Shannon, *supra* note 13, at 444.

AILA attorney for every 2,600 foreign-born individuals. There simply are not enough immigration attorneys.<sup>15</sup>

To meet the demand for immigration legal services, we see three main forms of service providers: private attorneys, attorneys at non-profit organizations, and private non-attorneys (often called “immigration consultants” or “*notarios*”). A few categories of non-attorneys are lawfully permitted to provide immigration legal services as well.<sup>16</sup> But the real need is for low-cost immigration legal services. By virtue of their recent arrival to our country, new immigrants usually need the most assistance. Because of the “correlation between poverty and recency of arrival,”<sup>17</sup> immigrants are most likely to most feel the effects of the general lack of legal services available to the poor in this country. Indeed, “foreign-born residents have a significantly higher poverty rate than that of natives (16.5% versus 12.1%).”<sup>18</sup> With attorneys’ fees rising<sup>19</sup> in tandem with the cost of law

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15. As a nation, we produce large numbers of law graduates, while law schools are increasingly worried about the employment rate of their graduates one year after graduation. The question of why all these lawyers do not fill this need for immigration legal services is not the subject of this paper, but one might think that because our law graduates are saddled with debt, perhaps they seek jobs offering higher salaries than offered by non-profit organizations or starting their own law practice. The number of jobs at non-profit agencies are limited as well, of course.

16. The largest group of these are called DOJ accredited representatives (formerly BIA accredited representatives). For a discussion and analysis of these categories of permitted non-attorney immigration practitioners, see *infra* notes 104–142 and accompanying text.

17. See Robert L. Bach, *Building Community Among Diversity: Legal Services for Impoverished Immigrants*, 27 U. MICH. J.L. REFORM 639, 646 (1994). Indeed, one in five Americans qualifies for free legal assistance based on their low income. See Legal Services Corporation, *supra* note 13, at 6 (citing U.S. Census Bureau data that indicates 60 million Americans have incomes at 125% of the federal poverty threshold). The Latin American foreign-born population appears to suffer from the highest poverty rate, at 20.6%. See DIANNE SCHMIDLEY, U.S. CENSUS BUREAU, CURRENT POPULATION REPS. P20-539, *The Foreign-Born Population in the United States: March 2002*, 6 (2003).

18. *From Poverty to Prosperity: A National Strategy to Cut Poverty in Half*, CENTER FOR AMERICAN PROGRESS 9 (2007), [www.americanprogress.org/wp-content/uploads/issues/2007/04/pdf/poverty\\_report.pdf](http://www.americanprogress.org/wp-content/uploads/issues/2007/04/pdf/poverty_report.pdf) [https://perma.cc/HXB9-QHKZ]. As of 2015, the poverty level of the foreign-born population remained at 16.5%. See Gustavo Lopez & Jynnah Radford, 2015, *Foreign-Born Population in the United States Statistical Portrait*, PEW RESEARCH CENTER (May 3, 2017), <http://www.pewhispanic.org/2017/05/03/facts-on-u-s-immigrants-current-data> [https://perma.cc/578B-VS7S] (last visited Jan. 23, 2019). As of 2016, the native-born poverty level was 12.3%. See Jessica L. Semega, Kayla R. Fontenot & Melissa A. Kollar, U.S. CENSUS BUREAU, *Income and Poverty in the United States: 2016*, 15 (Sept. 2017) <https://www.census.gov/content/dam/Census/library/publications/2017/demo/P60-259.pdf> [https://perma.cc/SJ8A-Z346].

19. The national average hourly cost for an immigration attorney is \$273, with hourly costs highest in the northeast and western regions of the United States. See THE 2016 AILA MARKETPLACE STUDY: A NATIONAL REFERENCE ON THE ECONOMICS OF IMMIGRATION LAW PRACTICE, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, 14 (2016).

degrees, immigrants are often priced out of retaining the services of a private attorney.

Immigrants inundate the offices of non-profit organizations across the nation, where they see long waiting lists and very small and underfunded staffs. The reality is that there is nowhere near the number of qualified immigration attorneys that are needed for immigration legal services. This is most obvious in areas with a high density of immigrants, such as Houston, Miami, and Los Angeles. In the Washington, D.C. metropolitan region, for example, non-profit organizations are completely unequipped to meet the growing demand for immigration assistance. Most immigration legal services agencies “only have between one and three attorneys on staff. The low number of attorneys underscores the limited capacity of many organizations in the face of tremendous need for legal services.”<sup>20</sup>

B. *The Unauthorized Practice of Law by Non-Attorney Immigration Professionals—“Notarios”*

To fill the gap, immigrants are forced to turn to the third source of service providers, private non-attorneys (or, as they are often called, *notarios*).<sup>21</sup> *Notarios* cover the middle ground that exists between high cost private attorneys, who are too expensive, and low-to-no-cost non-profit organizations, which are at capacity.

Who are these *notarios*? They might be friends or family members, and they might be well-meaning people who unwittingly commit the unauthorized practice of law. But in the vast majority of cases, *notarios* are non-attorneys who are in the business of practicing immigration law.

Despite the fact that most *notarios* do not hold themselves out as attorneys per se, immigrants flock to them for legal services. The reasons they do so are many, but chief among them may be cultural. Approximately half of the United States’ foreign-born population hail from Latin America, where attorneys and notaries are usually one and the same and often hold both titles: “*abogado y notario*.” In many Latin American countries, *notarios* are subject to rigorous examinations, regulation, and codes of professional responsibility and thus comprise “a select class of elite attorneys.”<sup>22</sup> Most *notarios* in Latin America draft legal documents and pro-

20. See *Survey of Immigrant Legal Service Providers in the Washington, DC Area*, TAHIRIH JUSTICE CENTER 9 (2006), <http://www.tahirih.org/site/wpcontent/uploads/2009/02/legalserviceessurveyreport.pdf> [Permalink unavailable].

21. “In conjunction, the phenomena of high Latino immigration to the United States, the poverty that often attends the immigrant experience, and the lack of affordable and accessible legal services create a need that is simply not filled by attorneys. Non-attorney notarios, whether well-intentioned or ill-intentioned, have stepped up to fill that demand.” Anne E. Langford, *What’s in a Name?: Notarios in the United States and the Exploitation of a Vulnerable Latino Immigrant Population*, 7 HARV. LATINO L. REV. 115, 119 (2004).

22. See Jennifer Barnes, *The Lawyer-Client Relationship in Immigration Law*, 52 EMORY L.J. 1215, 1217 (2003).

vide legal advice, and many also play quasi-judicial roles, such as having the power to declare legal instruments legally valid.<sup>23</sup>

In the United States, however, *notario* is nothing more than a false cognate that sounds like the English term “notary.”<sup>24</sup> Unlike *notarios* in many Latin American countries, notaries in the United States often are not required to undergo formal training or testing, and their duties are typically limited to witnessing the signing of documents—far different than taking responsibility for the content of such documents.<sup>25</sup>

Thus, it is natural for immigrants from Latin America to seek legal services from American *notarios* even though the latter are not authorized to practice law. Not only is the title one they are familiar with, but also the American *notarios* often speak their language. And because of the sheer numbers of immigrants in this country from Latin America, the disconnect between the services a Latin American *notario* and an American *notario* are equipped to perform is fertile ground for abuse in an industry that is not regulated.

Devastatingly, some of these non-attorney immigration practitioners commit what has come to be known as *notario* fraud, which is a type of consumer fraud that typically involves someone who represents herself as qualified to provide immigration legal services that she is not actually qualified to perform. *Notarios* may overcharge for their services, may charge for a service they never intend to render, and/or file inappropriate, inaccurate, and untimely paperwork with USCIS.

It is difficult to quantify the extent of the problem, except to say that it appears to be significant.<sup>26</sup> According to a study of the civil legal problems among low-income, foreign-born households, 13% of immigrants surveyed consulted a *notario* for legal assistance, with most seeking help with immigration status.<sup>27</sup> Even if the actual rate of *notario* use is only 10%, it would mean that 2.2 million of the nation’s 22 million foreign-born individuals have consulted or will consult an American *notario* for legal assistance.<sup>28</sup>

The number of those consultations that are or will be fraudulent is almost impossible to quantify. Others have noted this lack of data in this

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23. Langford, *supra* note 21, at 120.

24. See ELIZABETH COHEN ET AL., REPORT, TO PROTECT AND SERVE: ACCESS TO JUSTICE FOR VICTIMS OF NOTARIO FRAUD IN THE NATION’S CAPITAL (Ayuda & The Community Justice Project January 2013).

25. Langford, *supra* note 21, at 116, 121–22.

26. See, e.g., Lam Thuy Vo, *She Paid a Lawyer Thousands of Dollars to Apply for a Green Card. She Got a Deportation Order Instead*, BUZZFEED NEWS (Sept. 29, 2018), <https://www.buzzfeednews.com/article/lamvo/undocumented-immigrants-10-year-green-card> [<https://perma.cc/5QB8-VETV>] (describing how current anti-immigrant policies discourage individuals defrauded by *notarios* from reporting crimes to authorities).

27. Bach, *supra* note 17, at 651.

28. The use of *notarios* is particularly high among Latino immigrants—one in five have reported having used the services of a *notario*. Bach, *supra* note 17, at 652.



area<sup>29</sup> and have rightly concluded that “[g]iven the lack of reporting and empirical data, anecdotal evidence, while imperfect, is the only way to begin to understand the scope of *notario* fraud.”<sup>30</sup> Conversations with private and non-profit immigration attorneys confirm that *notario* fraud is seen in practice. An analysis of UPL or fraud cases lends support to this widespread anecdotal perception. Some *notarios* have defrauded thousands of victims,<sup>31</sup> and such fraud is not limited to the Latino population. *Notario* fraud is perpetrated on immigrants of many national origins. One lawsuit filed against then-Immigration and Naturalization Services noted that complaints about *notarios* have also been filed by Polish, Chinese, and Korean communities, among others.<sup>32</sup>

Yet for all the attention that bad *notarios* receive, good *notarios* also exist.<sup>33</sup> Although the same lack of data makes it impossible estimate the proportion of “good” *notarios* to “bad,” it is only logical that there exist *notarios* who actually know what they are doing and honestly represent their services. Anecdotal evidence confirms this as well.<sup>34</sup>

Yet bad *notarios* are not the only ones who make mistakes at the expense of their immigrant clients. The quality of the immigration bar has

29. See Alexandra M. Ashbrook, *The Unauthorized Practice of Law in Immigration: Examining the Propriety of Non-Lawyer Representation*, 5 GEO. J. LEGAL ETHICS 237, 252 (1991).

30. COHEN ET AL., *supra* note 24, at 16.

31. See Andrew F. Moore, *Fraud, the Unauthorized Practice of Law and Unmet Needs: A Look at State Laws Regulating Immigration Assistants*, 19 GEO. IMMIGR. L.J. 1, 6–8 (2004) (compiling press releases, media coverage, and complaints in several cases against “immigration consultants” to reveal that *notarios* often have hundreds or even thousands of victims).

32. Siskind Susser, *Lawsuit Filed Against INS to Stop Deportations Based on Applications Filed by Immigration Notarios*, Jul. 21, 2012, <http://www.visalaw.com/03jan4/14jan403.html> [Permalink unavailable] [<https://web.archive.org/web/20120801000000/http://www.visalaw.com/03jan4/14jan403.html/>].

33. *Notarios* often operate within “multiservices” companies that offer translations, tax preparation, and immigration assistance. While these *notarios* offer this type of assistance, they do not advertise themselves as attorneys. See, e.g., NUEVA ERA MULTI-SERVICES, <http://www.nuevaerams.com> [<https://perma.cc/H8UR-PDFT>] (Spanish language website advertising “multiservices” business in Lake Worth, Florida that provides following services: tax preparation, immigration services, international mailing services, bookkeeping and other business services, document filing, and translation) (last visited Jan. 23, 2019); MULTISERVICES EXPRESS, <http://www.immigrationmultiservices.com/home> [<https://perma.cc/NG4P-HCL5>] (Spanish language website advertising “multiservices” company located in Houston, Texas offering tax and immigration assistance) (last visited Jan. 23, 2019).

34. In this author’s experience, *notarios* often handle what might be termed “simple” cases: applications for Temporary Protected Status (TPS), work permit renewals, and petitions for Deferred Action for Childhood Arrivals. Holders of TPS, for example, often return again and again to the same *notario* due to the usually uncomplicated nature of TPS renewal applications and the fact that TPS must be renewed at least every 18 months. Immigrants satisfied with a *notario*’s work often refer their family and friends.

long been criticized.<sup>35</sup> A study of immigration judges in New York found that a shocking 33% of immigration lawyers were considered “inadequate” and 14% were “grossly inadequate.”<sup>36</sup> In other words, a law degree does not a good advocate make.

While we should remain steadfast in our commitment to criminalize and prosecute those who purposely target the vulnerable immigrant population,<sup>37</sup> acknowledging the reality that we have extremely high demand but a small supply of attorneys must prompt us to search for another, more realistic solution.<sup>38</sup>

### III. SOLUTIONS TO UNMET NEED AND UNAUTHORIZED PRACTICE OF LAW

#### A. *When the Practice of Law by Non-Attorneys is Allowed and Encouraged*

Several areas of law exist in which the practice of law by non-attorneys is allowed and even encouraged, depending on the jurisdiction: real estate transactions; tax preparation help; appointment of guardians ad litem; and victim advocates who accompany domestic violence survivors to court to petition for temporary restraining orders, to name a few.<sup>39</sup> A common thread in all of these examples, however, is that each has its own regulatory entity. This kind of oversight may be what prevents the vulnerable from being exploited.

Oversight aside, other kinds of non-attorney practice of law exist: on-line self-help guides for immigrants abound on the internet. In particular, DREAMERS—typically, immigrant students who were brought to the United States as young children by their parents—organized and posted videos, lists, and other guides to help other DREAMERS apply for Deferred Action for Childhood Arrivals (DACA) when it was first announced by President Obama in mid-2012. Free content ranging from YouTube

35. See Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Representation*, 63 STANFORD L. REV. 317, 330 (2011) (reporting that federal judges gave immigration attorneys lowest ranking for quality of any attorney type).

36. See Steering Comm. of the N.Y. Immigrant Representation Study Rep., *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings, New York Immigrant Representation Study Rep.: Part I*, 33 CARDOZO L. REV. 357, 391, 409–10 (2011) (analyzing 71,767 cases with least one hearing in New York immigration courts during between October 1, 2005 and July 13, 2010).

37. See generally Shannon, *supra* note 13; COHEN ET AL., *supra* note 24.

38. Mixed-model legal service delivery systems are not a new idea. Jeanne Charn and Richard Zorza introduced one mixed-model framework for full access to civil legal services for low- and moderate-income Americans in CIVIL LEGAL ASSISTANCE FOR ALL AMERICANS, BELLOW-SACKS ACCESS TO CIVIL LEGAL SERVICES PROJECT (President and Fellows of Harvard College, 2005), <http://www.courts.ca.gov/partners/documents/bellow-sacks.pdf> [<https://perma.cc/JZ78-CGQC>].

39. Other areas in which non-attorneys practice law include practice before the Social Security Administration, the U.S. Patent and Trademark Office, and in the DOJ’s Legal Orientation Programs. See Erin B. Corcoran, *Bypassing Civil Gideon: A Legislative Proposal*, 115 W. VA. L. REV. 643, 667–71 (2012).

videos made by for-profit companies<sup>40</sup> to (now-defunct) blog posts,<sup>41</sup> from a grassroots effort-made-national organization<sup>42</sup> to a website with self-submitted stories about immigrants<sup>43</sup> to the blog of a national labor non-profit,<sup>44</sup> burst onto the scene to guide DREAMERS as they applied for DACA and navigated its waters.

Indeed, this frenzy surrounding DACA may have marked the beginning of a collective cultural tipping point where technological innovations that assist immigrants in navigating the law actually prompt excitement and interest rather than evoke nightmares of unethical and unauthorized practice of law. This mirrors trends in the practice of law more generally. Legal document preparation sites, such as LegalZoom, have been sued a number of times and accused of UPL—all unsuccessfully. And scholars now research and write about ways in which technology can improve access to justice.<sup>45</sup> Cell phone apps such as Refugee Aid App (RefAid), launched in February 2016 to aid migrants and refugees seeking to build new lives around the world, are becoming more and more sophisticated in scope and geography.<sup>46</sup>

40. See, e.g., IMMIGRATION DIRECT, *What is Deferred Action (DACA)?*, YouTube (Aug. 14, 2012), <https://www.youtube.com/watch?v=ox8gf0YpAyQ> [Permalink unavailable].

41. See, e.g., DREAMERS DEFERRED ACTION, <http://dreamersdeferredaction.blogspot.com> [Permalink unavailable] (last visited Mar. 21, 2017).

42. See UNITED WE DREAM, <https://unitedwedream.org/our-work/protecting-immigrants> [https://perma.cc/3HUI-5TJU] (last visited Jan. 23, 2019).

43. See *Made Into America: Immigrant Stories Archive*, [https://madeintoamerica.org/?s=Dreamers+&gclid=CJ0KEQjwnsPGBRDo4c6RqK-Oqu8BEiQAwNviCSGiiOJrQbM3sicQQiD46X\\_2NIRfg0DyXO2oWl1IFy8aAiNQ8P8HAQ](https://madeintoamerica.org/?s=Dreamers+&gclid=CJ0KEQjwnsPGBRDo4c6RqK-Oqu8BEiQAwNviCSGiiOJrQbM3sicQQiD46X_2NIRfg0DyXO2oWl1IFy8aAiNQ8P8HAQ) [Permalink unavailable] (last visited Jan. 23, 2019).

44. See Labor Council for Latin Am. Advancement Blog, *Life After DACA: Obtaining a Social Security Number, Transferring Your Credit History, and Rescinding Your ITIN*, Dec. 8, 2012, <https://www.lclaa.org/lclaa-blog/entry/post-daca> [https://perma.cc/CD2T-AFQA] (last visited Jan. 23, 2019).

45. See generally Elinor R. Jordan, *Point, Click, Green Card: Can Technology Close the Gap in Immigrant Access to Justice?*, 31 GEO. IMMIGR. L.J. 287 (2017); *Why Legal Tech Conferences Have Become a Global Phenomenon*, ABA JOURNAL (June 15, 2018), [http://www.abajournal.com/news/article/why\\_legal\\_tech\\_conferences\\_have\\_become\\_a\\_global\\_phenomenon](http://www.abajournal.com/news/article/why_legal_tech_conferences_have_become_a_global_phenomenon) [https://perma.cc/35BS-ZU3B]; Robert May, *Three Ways Law Firms Use Technology for Client Communication*, A.B.A. LEGAL TECH. TODAY (Aug. 2017), <http://www.lawtechnologytoday.org/2017/08/tech-for-communication-with-clients/> [https://perma.cc/R737-UXDX]; Sherley Cruz, *Coding for Cultural Competency: Expanding Access to Justice with Technology*, 86 TENN. L. REV. (forthcoming, Winter 2019).

46. Other apps, such as RedadAlertas, Notifica, and Cell 411, focus on immigrant users seeking or sending local information, such as alerts about immigration raids, detention by ICE or police, and a user's GPS coordinates. See Olivia P. Tallet, *Undocumented Immigrants Turn to Technology to Avoid Arrests*, HOUS. CHRONICLE (Apr. 16, 2018), <https://www.houstonchronicle.com/news/article/New-mobile-app-helps-immigrants-at-risk-12833276.php> [https://perma.cc/FF9E-EGYF]; see also REDADALERTAS, <http://redadalertas.com> [https://perma.cc/45FG-JR8L] (last visited May 7, 2019); NOTIFICA, <https://notifica.us> [https://perma.cc/4YNA-8PGU] (last visited May 7, 2019); GET CELL 411, <https://getcell411.com> [https://perma.cc/2SGV-3PDD] (last visited May 7, 2019).

One area of law in particular in which the practice of law by non-attorneys is allowed and even encouraged is in Veterans Affairs claims. The Department of Veterans Affairs (VA) allows for the accreditation of claims agents by non-attorneys. The rationale behind the VA accreditation program is to increase access for the underserved population of veterans. Indeed, the VA notes that the accreditation program “exists to ensure that Veterans and their family members receive appropriate representation on their VA benefits claims.”<sup>47</sup> The regulations specify that their purpose is not simply to ensure that claimants have representation, but also that said representation is “responsible” and “qualified.”<sup>48</sup> In order to become an accredited representative, one must establish, among other things, (1) good character and reputation; (2) a demonstrated ability to represent claimants before the VA; (3) employment by an organization recognized by the VA; and (4) non-employment by any civil or military department or agency.<sup>49</sup> An accredited representative also must not charge excessive or unreasonable fees for representation.<sup>50</sup>

What is left unwritten is that VA accredited representatives do not have to be attorneys. The regulation acknowledges that a law degree is not necessary to competently and responsibly represent an individual before the VA. Both non-attorneys as well as attorneys must be accredited to appear before the VA, which means they have the same requirements for accreditation.<sup>51</sup> This includes the same educational requirements to qualify for accreditation and the same continuing legal education requirements to maintain accreditation.<sup>52</sup>

This practice of law by non-attorneys is regulated by published standards of conduct,<sup>53</sup> the violation of which may serve as the basis for termination of accreditation.<sup>54</sup> The regulation also lists various other causes for termination, such as “knowingly presenting a fraudulent claim,” or “other unlawful or unethical practice.”<sup>55</sup> The reasons to terminate both attorney and non-attorney VA accredited representatives are the same, again underscoring the lack of difference made by possession of a law degree.<sup>56</sup>

47. See *What An Applicant Should Know About Applying for Department of Veterans Affairs (VA) Accreditation As An Attorney or Claims Agent*, U.S. DEP’T OF VETERANS AFF. (Dec. 22, 2012), <http://www.va.gov/ogc/accreditation.asp> [https://perma.cc/3XCH-9G7A] (last visited Jan. 23, 2019).

48. 38 C.F.R. § 14.626 (2017).

49. 38 C.F.R. § 14.629 (2017).

50. 38 C.F.R. § 14.633(c)(6) (2017).

51. 38 C.F.R. § 14.629(b) (2017).

52. 38 C.F.R. § 14.629(b)(1)(iii), (iv) (2017).

53. 38 C.F.R. § 14.632 (2017).

54. 38 C.F.R. § 14.633 (2017).

55. *Id.*

56. In 2017, there were only 362 non-attorney VA accredited representatives, or “claims agents.” See *Manage Your Representative for VA Claims*, EBENEFITS, <https://www.ebenefits.va.gov/ebenefits/vso-search> [https://perma.cc/M4BJ-UFZB] (last visited Jan. 23, 2019). Whether the VA meets its goal of providing all veterans and their family members with representation is unclear, but representation does not

The non-attorney representation program through the Social Security Agency (SSA) certifies representatives for claimants appearing before the SSA Office of Hearings and Appeals and the Appeals Council.<sup>57</sup> The SSA permits claimants to appoint a non-attorney representative to represent them before the agency so long as the representative (1) is capable of helping the claimant with his or her claim; (2) is not disqualified or suspended from acting as a representative before the SSA; (3) is not prohibited by law from acting as a representative; and (4) is “generally known to have good character and reputation.”<sup>58</sup> Overall, the SSA reports that non-attorney representatives provide a high level of service.<sup>59</sup>

While tax preparation can be a legally complex process, the Internal Revenue Service (IRS) offers grants for non-profits and community organizations to run Volunteer Income Tax Assistance (VITA) and Tax Counseling for the Elderly (TCE) programs where trained non-attorney volunteers prepare and file income taxes for low- and middle-income, as well as elderly, community members.<sup>60</sup> VITA and TCE sites offer these services for free to all eligible individuals.<sup>61</sup> Individuals seeking tax preparation assistance are advised on what types of taxes the volunteers will prepare.<sup>62</sup> While a certified tax attorney may be onsite to answer legal or complex tax questions, most tax returns are prepared by and reviewed by non-attorney, trained volunteers before electronic submission to the IRS.<sup>63</sup>

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necessarily equate with efficiency: as of April 27, 2019, the total number of claims pending before the VA sits at 365,176, with the total number of “backlogged” claims (claims that have been awaiting decision for more than 125 days since receipt) hovering at 79,497. *See Detailed Claims Data*, U.S. DEP’T OF VETERANS AFF., [https://benefits.va.gov/reports/detailed\\_claims\\_data.asp](https://benefits.va.gov/reports/detailed_claims_data.asp) [<https://perma.cc/CXE5-GQXE>] (last visited Apr. 30, 2019).

57. *See* Corcoran, *supra* note 39, at 667.

58. 20 C.F.R. § 44.1705(b) (2018). The Social Security Administration (SSA) reserves the right to reject the appointment of a non-attorney representative if that person does not meet the listed requirements. *Id.* § 44.1705(c).

59. *See* Jacob M. Wolf, *Nonlawyer Practice Before the Social Security Administration*, 37 ADMIN L. REV. 413, 415 (1985).

60. These free services are available to “people who generally make \$54,000 or less, persons with disabilities, and limited English speaking taxpayers who need assistance in preparing their own tax returns,” as well as elderly individuals. Free Tax Return Preparation for Qualifying Taxpayers, INTERNAL REVENUE SERV. (June 5, 2018), <https://www.irs.gov/individuals/free-tax-return-preparation-for-you-by-volunteers> [<https://perma.cc/URA3-7GJV>].

61. *Id.*

62. *See IRS Certified Volunteers Providing Free Tax Preparation*, INTERNAL REVENUE SERV. (Oct. 2015), <https://www.irs.gov/pub/irs-pdf/p3676bsp.pdf> [<https://perma.cc/ECS9-R4T2>].

63. One of this author’s research assistants was a Volunteer Income Tax Assistance (VITA) Tax Preparer and Quality Reviewer at a VITA Site in Lancaster, Pennsylvania from 2010 through 2014.

The IRS maintains a set of requirements that VITA and TCE sites must follow to maintain IRS grant funding and certification.<sup>64</sup> Volunteers who prepare taxes at VITA and TCE sites are required to score at least 80% on either the Basic, Advanced, Military, or International IRS tax preparation exam, as well as pass the Standards of Conduct certification exam.<sup>65</sup> Unlike with other non-attorney legal practice programs, VITA and TCE Tax Preparers and Quality Reviewers need not be employed by the community organizations hosting the tax clinics. The site leaders must only ensure that non-attorneys preparing and reviewing taxes have completed the coursework and passed the exams required by the IRS, as well as abide by IRS guidelines for professional responsibility.<sup>66</sup>

#### B. *Solutions to Unmet Need Utilized in Various Jurisdictions*

A number of jurisdictions and authorities have attempted to tackle the problem of meeting the need for civil legal services, including in the realm of. Several proposals merit examinations. The Immigrant Justice Corps, for example, was founded in 2014 and is now in its sixth year of operation in the New York City area and select parts of the country. While a growing cadre of voices echo the argument that law schools are in crisis and should consider decreasing the number of years to obtain a JD from three to two, Washington State graduated its first class of Limited License Legal Technicians (LLLTs) in May 2015.<sup>67</sup> Other states, such as Califor-

64. See I.R.S. Pub. 5166, *Quality Site Requirements*, 2017 WL 6025998 (Oct. 2017).

65. See *Volunteer Training Certification*, INTERNAL REVENUE SERVICE (Mar. 27, 2018), <https://www.irs.gov/individuals/volunteer-training-certification> [<https://perma.cc/V53K-FHXL>].

66. See 31 C.F.R. § 10. Interestingly, the intersection of tax and immigration is an area ripe for fraud. In recent years, legitimate tax preparation companies announced programs to offer immigration assistance to their customers. In 2014, Liberty Tax Service announced a new tax preparation brand called SiempreTax+, which was aimed at Hispanic communities and offered a variety of services, including immigration assistance. Although the company no longer offers immigration services, it does offer tax services aimed at immigrants, such as assistance in requesting an Individual Taxpayer Identification Number. In 2015, tax preparation firm H&R Block announced and then terminated a pilot program offered at their Texas locations. This program offered assistance to immigrants filing forms and applications with USCIS. See David Noriega, *Under Pressure, H&R Block Kills Immigration Services Program*, BUZZFEED NEWS (March 30, 2015), <https://www.buzzfeednews.com/article/davidnoriega/hr-block-shuts-down-immigrant-services-under-pressure-from-i> [<https://perma.cc/8L3C-E66E>]; *Plus Services and Resources*, SIEMPRETAX+, <https://www.siempretax.com/en/services> [<https://perma.cc/FR2U-AA3V>] (last visited May 7, 2019); LIBERTY TAX SERVICE, *Liberty Tax Service Creates New, Hispanic-Focused Brand – SiempreTax+* (Nov. 6, 2014), <https://ir.libertytax.com/news-releases/news-release-details/liberty-tax-service-creates-new-hispanic-focused-brand> [<https://perma.cc/6R6N-JEZL>].

67. *Limited License Legal Technicians*, WASH. ST. BAR ASS'N (Oct. 15, 2018), <https://www.wsba.org/for-legal-professionals/join-the-legal-profession-in-wa/limited-license-legal-technicians> [<https://perma.cc/6F33-4J59>].

nia,<sup>68</sup> Colorado,<sup>69</sup> Oregon,<sup>70</sup> and New Mexico<sup>71</sup> are also examining the same possibility. Additionally, ad hoc coalitions, armies of volunteers, and local government-funded immigrant defense funds have sprung into existence in recent years in response to the Trump administration's immigration policies. These measures, though welcome, are dwarfed by the scale of the unmet need for affordable immigration legal services.

### 1. *The Immigrant Justice Corps*

The Immigrant Justice Corps (IJC) was born of an idea of Robert Katzmann, Chief Judge of the U.S. Court of Appeals for the Second Circuit, “as a response to the crisis in legal representation for immigrants that he saw every day as a federal judge.”<sup>72</sup> Its goal is “to increase both the quality and quantity of legal services available for immigrants.”<sup>73</sup> Using \$1.4 million in “seed-funding” from the Robin Hood Foundation, IJC began awarding two-year fellowships to recent law school and college graduates to provide legal counsel and support to poor immigrants and their families. Since 2014, IJC has awarded each year a total of thirty-five fellowships (twenty-five “Justice Fellowships” for law graduates and ten “Community Fellowships” for college graduates).<sup>74</sup> Interestingly, the IJC structure calls for Community Fellows—the college graduates—to become DOJ accredited representatives.<sup>75</sup> Not only will they conduct outreach, but also

68. See CIVIL JUSTICE STRATEGIES TASK FORCE, ST. BAR OF CAL. CIVIL JUSTICE STRATEGIES TASK FORCE REPORT AND RECOMMENDATIONS 19 (2015), <http://www.calbar.ca.gov/About-Us/Our-Mission/Protecting-the-Public/Public-Comment/Public-Comment-Archives/2015-Public-Comment/2015-05> [https://perma.cc/9NE8-LM8X].

69. See James Carlson, *Colorado Studying New Limited Legal License*, COLO. SUP. CT. OFF. OF ATT'Y REG. COUNS. (Spring 2015), <http://www.coloradosupremecourt.us/Newsletters/Spring2015/Colorado%20studying%20new%20limited%20legal%20license.htm> [https://perma.cc/78LC-MU82].

70. In June 2017, the Oregon State Bar Futures Task Force submitted a report to the Oregon State Bar Board of Governors recommending the licensing of “paraprofessionals,” including paralegals, LLLTs, and document preparers. FUTURES TASK FORCE, OR. STATE BAR, REPORTS AND RECOMMENDATIONS OF THE REGULATORY COMMITTEE AND INNOVATIONS COMMITTEE 3 (June 2017), [https://www.osbar.org/\\_docs/resources/taskforces/futures/FuturesTF\\_Reports.pdf](https://www.osbar.org/_docs/resources/taskforces/futures/FuturesTF_Reports.pdf) [https://perma.cc/R52U-Z2AQ].

71. See NAT'L ORG. OF BAR COUNSEL, *Jurisdictions' Activity on Alternative Licensed Legal Professionals* (May 2015), [https://cdn.ymaws.com/www.inbar.org/resource/resmgr/Conclave/Alt\\_license\\_table\\_May\\_18\\_\\_20.pdf](https://cdn.ymaws.com/www.inbar.org/resource/resmgr/Conclave/Alt_license_table_May_18__20.pdf) [https://perma.cc/6WVK-8DNN].

72. See *Our Story*, IMMIGRANT JUST. CORPS, <http://justicecorps.org/our-story/> [https://perma.cc/DJ2F-5YFJ] (last visited Jan. 28, 2019).

73. See *Justice Fellow FAQs*, IMMIGRANT JUST. CORPS, <http://justicecorps.org/wp-content/uploads/2014/01/Justice-Fellow-FAQs.pdf> [https://perma.cc/VG29-XNGL] (last visited Jan. 28, 2019).

74. In 2015, IJC awarded a total of forty fellowships (twenty-five law graduates, fifteen college graduates).

75. For a discussion and analysis of DOJ accredited representatives, see *infra* notes 134–42 and accompanying text.

they will conduct legal intakes (screen for legal relief) and file immigration applications for citizenship, green cards, DACA, etc.<sup>76</sup>

Certainly, the IJC draws attention and plenty of good press. But what happens at the end of the two-year fellowship?<sup>77</sup> IJC advertises for Justice Fellows by stating that “IJC Fellows will be extraordinarily well trained, deeply networked in the immigrant rights community, and committed to developing creative strategies to fight poverty and ensure access to justice.”<sup>78</sup> The IJC even encourages Community Fellows to become attorneys, saying that the fellowship “provides an excellent experience for recent graduates considering a career in law and/or immigrant rights advocacy.”<sup>79</sup> Acknowledging the fact that the IJC is a response to the lack of immigration legal services, the hope, one imagines, is that fellowship alumni will find ways to create new jobs for themselves when their two years are up. Its website claims that 92% of graduating Justice Fellows “will continue to work in immigration law” (which includes jobs with IJC, host organizations, other non-profits, government agencies, and private practice), but it does not specify whether those jobs were pre-existing or new.<sup>80</sup> The IJC program, while certainly bold and effective in bringing attention to the problem of the unmet need for immigration legal services, is only one very small solution for a very large problem.

## 2. *Limited License Legal Technicians*

Washington State has taken the lead in implementing an intriguing program for a new class of legal professionals called Limited License Legal Technicians (LLLT).<sup>81</sup> The Washington Supreme Court turned to its 2003 Civil Legal Needs Study, which revealed that more than 80% of peo-

76. See *Fellowship*, IMMIGRANT JUST. CORPS, <http://justicecorps.org/the-fellowship/> [https://perma.cc/HZ6T-N3U6] (last visited Jan. 28, 2019).

77. At one point, IJC stated that, with the mutual agreement of the Justice Fellow and her host, the fellowship could be renewed for a third year. See *id.*

78. *Id.*

79. *Id.*

80. See *Justice Fellowship*, IMMIGRANT JUST. CORPS, <http://justicecorps.org/justice-fellowship/> [https://perma.cc/7RBX-SJ2V] (last visited Apr. 30, 2019).

81. See generally Becca Donaldson, *Who Accesses Justice? The Rise of Limited License Legal Technicians*, 4(5) HARVARD LAW SCHOOL CENTER ON THE LEGAL PROFESSION: THE PRACTICE, July 2018, <https://thepractice.law.harvard.edu/article/who-accesses-justice/> [https://perma.cc/94T8-3456]; Gene Johnson, *Washington Experiments with More Affordable Legal Advice*, SEATTLE TIMES (Sept. 27, 2015 4:55 PM), <https://www.seattletimes.com/seattle-news/washington-experiments-with-more-affordable-legal-advice/> [https://perma.cc/Z875-FDRF]; Jane Reardon, *Future or Folly: Limited License Legal Technicians*, ILL. SUP. CT. COMMISSION ON PROFESSIONALISM: 2CIVILITY (May 14, 2015), <https://www.2civility.org/limited-license-legal-technicians/> [https://perma.cc/JNN5-88ND]; Ellen Reed, *Legal Technicians: A Limited License to Practice Law*, WASH. ST. BAR ASS'N, [https://www.americanbar.org/content/dam/aba/directories/pro\\_bono\\_clearinghouse/ejc\\_2014\\_066.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/directories/pro_bono_clearinghouse/ejc_2014_066.authcheckdam.pdf) [https://perma.cc/E3DU-TBQF] (last visited Jan. 28, 2019). Jurisdictions across the United States are watching the Washington State LLLT program closely. See Sands McKinley, *Legal Technicians Across the US*, SANDS MCKINLEY: ON



ple in Washington with low or moderate income experienced a legal need and went without help because they could not afford it or did not know where to turn.<sup>82</sup> The LLLT program was created with the intention of helping to meet the state's civil legal needs. As one lawyer proclaimed in *The Washington Post*, "[t]hey are the nurse practitioners of the legal world."<sup>83</sup> After taking about a year of classes at a community college, then a licensing exam, these LLLTs will be allowed to help clients in much the same way as attorneys (except in court).<sup>84</sup>

In order to become an LLLT, candidates must:

- (1) obtain an associate's degree or higher;
- (2) complete 45 credit hours of core curriculum through an American Bar Association-approved law school or LLLT Board-approved paralegal program;
- (3) complete applicable practice area courses offered through the University of Washington School of Law;
- (4) complete 3,000 hours of paralegal or legal assistant experience involving substantive legal work in any practice area under the supervision of a lawyer;
- (5) take and pass the Paralegal Core Competency Exam;
- (6) take and pass the LLLT Practice Area Examination; and
- (7) take and pass the LLLT Professional Responsibility Examination.<sup>85</sup>

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THE FUTURE OF LAW (June 5, 2015), <http://www.sandsmckinley.com/legal-technicians-across-the-us/> [<https://perma.cc/QK76-BYR9>].

82. Task Force on Civil Equal Justice Funding, *The Washington State Civil Legal Needs Study*, WASH. STATE SUPREME COURT (Sept. 2003), <https://www.courts.wa.gov/newsinfo/content/taskforce/CivilLegalNeeds.pdf> [<https://perma.cc/75UE-64QJ>].

83. See Robert Ambrogi, *Who Says You Need a Law Degree to Practice Law?*, WASH. POST (March 13, 2015), [https://www.washingtonpost.com/opinions/closing-the-justice-gap/2015/03/13/a5f576c8-c754-11e4-aa1a-86135599fb0f\\_story.html?utm\\_term=.b3ab499c702a](https://www.washingtonpost.com/opinions/closing-the-justice-gap/2015/03/13/a5f576c8-c754-11e4-aa1a-86135599fb0f_story.html?utm_term=.b3ab499c702a) [<https://perma.cc/TR6B-NVXH>].

84. While LLLTs are not permitted to appear in court, they can "consult with and advise clients, complete and file necessary court documents, help with court scheduling, and support clients in navigating the legal system." *Limited License Legal Technicians*, WASH. STATE BAR ASS'N, <https://www.wsba.org/for-legal-professionals/join-the-legal-profession-in-wa/limited-license-legal-technicians> [<https://perma.cc/R32C-97HB>] (last updated Jan. 16, 2019).

85. See WASH. SUP. CT. A.P.R. 1-3, 13; see also *Become a Legal Technician*, WASH. STATE BAR ASS'N, <https://www.wsba.org/for-legal-professionals/join-the-legal-profession-in-wa/limited-license-legal-technicians/become-a-legal-technician> [<https://perma.cc/Z9NL-AJPQ>] (last updated Jan. 7, 2019). Previously, the requirements for LLLTs were not so numerous nor so specific. See *Legal Technician FAQs*, WASH. STATE BAR ASS'N, <http://www.wsba.org/Licensing-and-Lawyer-Conduct/Limited-Licenses/Legal-Technicians/Legal-Technician-FAQs> (last visited Nov. 22, 2017). [<https://web.archive.org/web/20170426062936/http://www.wsba.org/Licensing-and-Lawyer-Conduct/Limited-Licenses/Legal-Technicians/Legal-Technician-FAQs>].

The program's architects have been cautious: the program began by graduating LLLTs in only one practice area (family law), and only now is it considering the addition of another practice area ("consumer money and debt law").<sup>86</sup> Since the program's implementation in 2014, only thirty-nine LLLTs have graduated and become licensed.<sup>87</sup> This program, while a brave foray into the world of non-attorney legal professionals, is still far from adequately meeting the legal needs of low-income Washingtonians.

### 3. *Ad Hoc Coalitions, Volunteers, and Immigrant Defense Funds: A Response to Trump's Policies*

Executive Order 13,769,<sup>88</sup> often referred to as Muslim Ban 1.0, sparked the creation of ad hoc immigration coalitions and groups formed in response to the Trump administration's policies. In January and February of 2017, thousands of activists—many of them lawyers—inundated airports around the United States to assist people detained under the ban and their family members.<sup>89</sup> Civil rights organizations banded together with law school clinics to halt these detentions and deportations,<sup>90</sup> and donations poured into immigration organizations around the nation from

86. See *LLLT Board*, WASH. STATE BAR ASS'N, <https://www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/LLLT-board> [https://perma.cc/S36W-8FY3] (last updated Jan. 17, 2019). Consumer money and debt law is "designed to provide the public with economic protection and legal assistance on certain financial matters and consumer debt issues." *Id.*

87. A search of the online legal directory of the Washington State Bar Association reveals just thirty-six active LLLTs and three inactive LLLTs. Legal Dictionary, WASH. STATE BAR ASS'N, <https://www.mywsba.org/PersonifyEbusiness/LegalDirectory.aspx?ShowSearchResults=TRUE&LicenseType=LLLT> [https://perma.cc/P745-75TJ] (last visited Jan. 28, 2019).

88. See Proclamation No. 13769, 82 Fed. Reg. 8977 (Feb. 1, 2017).

89. See, e.g., Jonah E. Bromwich, *Lawyers Mobilize at Nation's Airports After Trump's Order*, N.Y. TIMES (Jan. 29, 2017), <https://www.nytimes.com/2017/01/29/us/lawyers-trump-muslim-ban-immigration.html> [https://perma.cc/9GXM-S9SK]; Katherine Shaver, *We're the Good Guys: Lawyers Continue Airport Campouts Amid Trump Travel Ban*, WASH. POST (Feb. 3, 2017), [https://www.washingtonpost.com/local/were-the-good-guys-lawyers-continue-airport-campouts-amid-trump-travel-ban/2017/02/03/7503dd94-e957-11e6-bf6f-301b6b443624\\_story.html?utm\\_term=.097cf17876b0](https://www.washingtonpost.com/local/were-the-good-guys-lawyers-continue-airport-campouts-amid-trump-travel-ban/2017/02/03/7503dd94-e957-11e6-bf6f-301b6b443624_story.html?utm_term=.097cf17876b0) [https://perma.cc/V4LL-9JLD].

90. See, e.g., Debbie Elliott, *Louisiana Immigrant Rights Groups Organize Against Trump Policies*, NPR (Feb. 16, 2017), <https://www.npr.org/2017/02/16/515584899/louisiana-immigrant-rights-groups-organize-against-trump-policies> [https://perma.cc/TT8R-96PC]; Charlie Savage, *Liberal Lawyers Plan Wave of Resistance to Trump Policies*, N.Y. TIMES (Jan. 30, 2017), <https://www.nytimes.com/2017/01/30/us/politics/lawyers-trump-travel-order.html> [https://perma.cc/W6YD-AAEF]; Ann M. Simmons, *Democratic Attorneys General From 15 States Condemn Trump Immigration Order*, LA TIMES (Jan. 29, 2017), <http://www.latimes.com/politics/washington/lana-trailguide-updates-democratic-attorneys-general-from-15-1485723316.htmlstory.html#> [https://perma.cc/B3Y3-GTZJ]; John Washington, *Legal Groups Are Already Planning for Trump's Next Attack on Immigrants and Refugees*, THE NATION (Feb. 24, 2017), <https://www.thenation.com/article/legal-groups-are-already-planning-for-trumps-next-attack-on-immigrants-and-refugees/> [https://perma.cc/AH74-YYUA].

individuals as well as corporations.<sup>91</sup> Groups of pro bono lawyers and interpreters formed, organizing volunteers and funneling them to a seemingly never-ending number of opportunities to help immigrants and refugees.<sup>92</sup>

Despite this sudden, passionate outpouring of money and pro bono hours in the name of helping immigrants, activity is primarily aimed at aiding those who are immediately affected by the Trump administration's latest policies: lawsuits against the travel bans;<sup>93</sup> DACA renewal clinics;<sup>94</sup> and GoFundMe campaigns to send lawyers to our southern border to assist asylum-seekers.<sup>95</sup> For lack of time, and, perhaps, out of mental exhaustion, the more mundane, common cases are often overlooked—the naturalizations, the work permit renewals, the family petitions, etc.

Local governments are also taking steps toward providing free immigration legal services for their residents in direct response to the Trump administration's stance on immigration. Washington, D.C., Los Angeles, Boston, New York, and Denver are among several cities and counties that have established, with public dollars, immigrant defense funds to pay for lawyers to represent immigrants.<sup>96</sup> Some of these funds have begun mod-

91. See, e.g., Adam Chandler, *Cars, Shoes, Tech: An Array of Corporations Protests the Immigration Ban*, THE ATLANTIC (Jan. 31, 2017), <https://www.theatlantic.com/business/archive/2017/01/corporations-protest-immigration-ban/515076> [<https://perma.cc/APN2-BXBA>]; Sarah Frier et. al., *Google Coordinates Funding of Legal Brief Versus Trump Order*, BLOOMBERG (Feb. 6, 2017 9:45 PM), <https://www.bloomberg.com/news/articles/2017-02-07/google-said-to-fund-legal-brief-against-trump-immigration-order> [Permalink unavailable]; Sam Shead, *Silicon Valley is Financing the Fight Against Trump's Immigration Policy*, BUS. INSIDER (Jan. 30, 2017), <https://www.businessinsider.com/r-silicon-valley-puts-money-and-muscle-into-fighting-trump-immigrant-curbs-2017-1> [<https://perma.cc/XKE8-N9MK>].

92. See, e.g., *Chicago Fil-Am Lawyers Join Sister Groups Against Trump Order*, INQUIRER (Feb. 7, 2017), [https://usa.inquirer.net/1412/chicago-fil-lawyers-join-sister-groups-trump-order?utm\\_expid=.XqNwTug2W6nwDVUSgFJXed.1](https://usa.inquirer.net/1412/chicago-fil-lawyers-join-sister-groups-trump-order?utm_expid=.XqNwTug2W6nwDVUSgFJXed.1) [<https://perma.cc/V47C-UK6F>] (placing a request for volunteers at the end of the news article).

93. See, e.g., *Hawaii v. Trump*, 241 F. Supp. 3d 1119 (D. Haw. 2017); *Int'l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539 (D. Md. 2017).

94. See *Deferred Action Clinics (DACA)*, NAT'L IMMIGRANT JUST. CTR., <https://www.immigrantjustice.org/calendar/deferred-action-clinics-daca> [<https://perma.cc/8WXR-E55S>] (last visited Jan. 28, 2019).

95. See, e.g., *Help Get this Lawyer to TX Border*, GoFUNDME, <https://www.gofundme.com/help-get-this-lawyer-to-tx-border> [<https://perma.cc/V6TQ-MK66>] (last visited Jan. 28, 2019); *Send Attorneys to Detained Families*, GoFUNDME, <https://www.gofundme.com/send-attorneys-to-detained-families> [<https://perma.cc/F9H6-AZXF>] (last visited Jan. 28, 2019).

96. See Aaron C. Davis, *D.C. Will Go 'Beyond Sanctuary,' Create Legal Defense Fund for Illegal Immigrants*, WASH. POST, (Jan. 9, 2017), [https://www.washingtonpost.com/local/dc-politics/dc-will-go-beyond-sanctuary-create-legal-defense-fund-for-illegal-immigrants/2017/01/09/0d6c7adc-d68e-11e6-9f9f-5cdb4b7f8dd7\\_story.html?noredirect=on&utm\\_term=.b8ad54329796](https://www.washingtonpost.com/local/dc-politics/dc-will-go-beyond-sanctuary-create-legal-defense-fund-for-illegal-immigrants/2017/01/09/0d6c7adc-d68e-11e6-9f9f-5cdb4b7f8dd7_story.html?noredirect=on&utm_term=.b8ad54329796) [<https://perma.cc/P7RZ-JH6V>]; *L.A. Justice Fund*, CALIFORNIA COMMUNITY FOUNDATION, <https://www.calfund.org/lajusticefund/> [<https://perma.cc/PZN6-LHT6>] (last visited May 7, 2019); *Greater Boston Immigrant Defense Fund Announced*, CITY OF BOS. (Sept. 13, 2017), <https://www.boston.gov/news/greater-boston-immigrant-defense-fund-announced>

estly: Denver has set aside \$385,000 this year,<sup>97</sup> the city of Boston is contributing \$50,000 for the first time,<sup>98</sup> and Washington, D.C.'s fund started out with \$500,000 in 2017 but has now expanded to \$2.5 million.<sup>99</sup> The funds provide grants to area organizations, which have enabled them to hire more legal staff to assist immigrants. In creating these immigrant defense funds, the local governments explicitly cite as inspiration the Trump administration's crackdown on undocumented immigrants: Washington, D.C.'s mayor, Muriel Bowser, stated in her announcement of the grants that D.C. was "'doubling down' on its status as a sanctuary city,"<sup>100</sup> New York Governor Andrew Cuomo referred to "these stormy times" when he first announced the Liberty Defense Project,<sup>101</sup> and Denver's mayor, Michael Hancock, said the city's decision to create its fund grew out of the outpouring of fear and anxiety from the city's immigrants because of Trump's policies.<sup>102</sup> Although other local governments are following suit and considering taxpayer-funded immigrant defense funds of their own,<sup>103</sup> it remains notable that the intended purpose of these funds is to pay for more attorneys, and especially attorneys who are defending immigrants in immigration court.

#### IV. AUTHORIZED NON-ATTORNEY PRACTICE OF IMMIGRATION LAW: THE CURRENT MODEL

Broadly speaking, the practice of immigration law takes place before two agencies: the Department of Homeland Security's U.S. Citizenship

[<https://perma.cc/C9LY-NWAJ>]; Octavio Blanco, *New York to Provide Lawyers for Immigrants Facing Deportation*, CNN MONEY (Apr. 13, 2017), <https://money.cnn.com/2017/04/13/news/economy/new-york-immigrant-legal-defense-fund/index.html> [<https://perma.cc/N8K6-GJZ8>]; Colleen Slevin, *Network of Local Immigrant Legal Defense Funds Expanding*, AP NEWS (Nov. 15, 2018), <https://www.apnews.com/79811e5eab7c4e3186462d6bdd74c62b> [<https://perma.cc/GJL6-Q3BY>]. These funds can also be a mix of public and private dollars, like the Greater Boston Immigrant Defense Fund and the L.A. Justice Fund.

97. See Slevin, *supra* note 96.

98. See Editorial, *A Long-Awaited Expansion for Boston's Immigrant Defense Fund*, BOS. GLOBE, <https://www.bostonglobe.com/opinion/editorials/2019/04/19/long-awaited-expansion-for-boston-immigrant-defense-fund/wBhnm3E2RO4WgoxheEBIkN/story.html> [<https://perma.cc/6G5T-Y7TS>] (last visited May 7, 2019).

99. See Davis, *supra* note 96; see also Tyrone Turner, *Bowser Pledges More Money for Affordable Housing, Says D.C. Will Push to Buy RFK Campus*, AM. U. RADIO (Mar. 18, 2019), <https://wamu.org/story/19/03/18/bowser-pledges-more-money-for-affordable-housing-says-d-c-will-push-to-buy-rfk-campus/> [<https://perma.cc/AJW6-L4WR>].

100. See Davis, *supra* note 96.

101. See Blanco, *supra* note 96.

102. See Slevin, *supra* note 96.

103. See, e.g., Antonio Olivo, *Virginia's Largest County Could be Next to Help Undocumented Immigrants Fight Deportation*, WASH. POST (Apr. 10, 2019), [https://www.washingtonpost.com/local/virginia-politics/fairfax-county-considers-fund-to-help-undocumented-immigrants-fight-deportation/2019/04/10/0b1e1c30-5adb-11e9-a00e-050dc7b82693\\_story.html?utm\\_term=.a4a73840bf72](https://www.washingtonpost.com/local/virginia-politics/fairfax-county-considers-fund-to-help-undocumented-immigrants-fight-deportation/2019/04/10/0b1e1c30-5adb-11e9-a00e-050dc7b82693_story.html?utm_term=.a4a73840bf72) [<https://perma.cc/WZ6X-M7F9>].

and Immigration Services (USCIS) and the Department of Justice's Executive Office for Immigration Review (EOIR). Practice before USCIS is generally limited to the filing of forms to apply for immigration benefits but may include advocating for applicants in non-court settings, such as interviews with immigration officers. Practice before EOIR involves advocating before immigration judges in immigration court and the Board of Immigration Appeals (an appellate body of the EOIR).

While a person seeking immigration relief or an immigration benefit "shall have the privilege of being represented," the law requires that such representation not be provided at government expense, even in removal proceedings.<sup>104</sup> As noted in Section II.A., the Code of Federal Regulations actually provides a way for certain non-attorneys to practice immigration law, creating a small group of representatives to which immigrants can turn in addition to private attorneys, non-profit attorneys, and unauthorized *notarios*.

The regulations allow for four main categories of non-attorneys to practice before USCIS and EOIR.<sup>105</sup> These non-attorneys are (1) law students and law graduates not yet admitted to the bar, as long as they are under the direct supervision of an attorney or accredited representative;<sup>106</sup> (2) "reputable individuals" who have a pre-existing relationship with the person they are representing;<sup>107</sup> (3) accredited officials of the government to which the represented person owes allegiance;<sup>108</sup> and (4) accredited representatives.<sup>109</sup> These provisions, particularly the one allowing "reputable individuals" to act as representatives, may seem dangerously broad given the UPL concerns outlined in Section II.B., but in fact, the regulations are very narrow with respect to each type of non-lawyer.

#### A. *Law Students, Reputable Individuals, and Government Officials*

A law student or law graduate of an accredited U.S. law school not yet admitted to the bar may be a representative before USCIS and EOIR if she:

- (1) appears at the request of the person entitled to representation;
- (2) (in the case of a law student) files a statement that she is participating, under the direct supervision of a faculty member, licensed attorney or accredited representative, in a legal aid program or clinic conducted by a law school or non-profit organization; or (in the case of a law graduate) files a

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104. See 8 U.S.C. § 1362 (2018); see also 8 U.S.C. § 1229a(b)(4)(a) (2018).

105. 8 C.F.R. § 292.1(a) (2016); see also 8 C.F.R. § 1292.1(a) (2016).

106. 8 C.F.R. § 292.1(a)(2) (2016); see also 8 C.F.R. § 1292.1(a)(2) (2016).

107. 8 C.F.R. § 292.1(a)(3) (2016); see also 8 C.F.R. § 1292.1(a)(3) (2016).

108. 8 C.F.R. § 292.1(a)(5) (2016); see also 8 C.F.R. § 1292.1(a)(5) (2016).

109. 8 C.F.R. § 292.1(a)(4) (2016); see also 8 C.F.R. § 1292.1(a)(4) (2016).

statement that she appears under the supervision of a licensed attorney or accredited representative;

- (3) files a statement that she appears without direct or indirect remuneration from the person she represents; and
- (4) the appearance is permitted by the official before whom she wishes to appear.<sup>110</sup>

A “reputable individual” may appear before USCIS and EOIR if she:

- (1) is an individual of good moral character;
- (2) appears on an individual case basis, at the request of the person she represents;
- (3) files a written declaration that she appears without direct or indirect remuneration;
- (4) has a pre-existing relationship or connection with the person she represents (such as a relative, neighbor, clergyman, business associate, or personal friend);
- (5) the appearance is permitted by the official before whom she wishes to appear; and
- (6) does not regularly engage in immigration and naturalization practice or preparation or holds herself out to the public as qualified to do so.<sup>111</sup>

An accredited official<sup>112</sup> of the government to which the represented person owes allegiance may appear before USCIS and EOIR if she:

- (1) appears with the consent of the represented person;
- (2) is in the United States; and
- (3) appears solely in her official capacity.<sup>113</sup>

Law students, law graduates, and reputable individuals share three important qualifications: they can only appear at the request of the person represented, they are not permitted to receive direct or indirect remuneration, and they must obtain the permission of the USCIS or EOIR official before whom they wish to appear. In other words, the represented person must consent to the representation, the representation must be free of charge, and USCIS or EOIR must approve of the representation. Taken

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110. 8 C.F.R. § 292.1(a)(2) (2016); *see also* 8 C.F.R. § 1292.1(a)(2) (2016).

111. 8 C.F.R. § 292.1(a)(3) (2016); *see also* 8 C.F.R. § 1292.1(a)(3) (2016).

112. Because accredited officials rarely, if ever, serve as representatives, I will not analyze them here. Two other categories of non-U.S. attorneys permitted to practice before either USCIS, EOIR, or both: attorneys outside the United States licensed to practice law and in good standing (8 C.F.R. § 292.1(a)(6) (2016)) and persons formerly authorized to practice before USCIS and EOIR on December 23, 1952 (8 C.F.R. § 292.1(b) (2016)). Furthermore, attorneys may appear as *amicus curiae* before the Board of Immigration Appeals, if it serves the public interest (8 C.F.R. § 292.1(d) (2016)).

113. 8 C.F.R. § 292.1(a)(5) (2016); *see also* 8 C.F.R. § 1292.1(a)(5) (2016).

together, these qualifications work to protect the represented person from unscrupulous individuals who might otherwise take advantage of them.

Each of these categories has an additional backstop: law students and law graduates must work under the direct supervision of an attorney or accredited representative (and law students must work in a clinic or non-profit setting), while reputable individuals must not regularly engage in immigration work. Although one scholar has called the category of reputable individuals “problematic,”<sup>114</sup> the limitation that these individuals must not otherwise regularly engage in immigration practice or preparation, nor hold themselves out as qualified to do so—combined with the necessary permission of a USCIS or EOIR official—ensures that they are not frequent, repeat players. The regulations do not create a “general ability for non-attorneys to appear as representatives and charge for their services as an attorney would.”<sup>115</sup>

Interestingly, the BIA Practice Manual specifies that “immigration specialists—which include visa consultants and ‘notarios’—are *not* authorized to practice law or appear before the Board.”<sup>116</sup> Further, it reiterates the regulations’ representation requirements for non-attorneys, in particular that “reputable individuals,” law students, and law graduates must not receive direct or indirect remuneration for their appearance, and that reputable individuals may not make immigration appearances on a regular basis.<sup>117</sup>

#### B. Accredited Representatives

The last category of non-attorneys, “accredited representatives,” is the most significant. The regulations specifically create an entire group of non-attorneys who regularly practice immigration law. Currently, EOIR’s Office of Legal Access Programs (OLAP) offers partial and full accreditation to certain employees of designated non-profit organizations.<sup>118</sup> Par-

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114. Ashbrook, *supra* note 29, at 240.

115. Moore, *supra* note 31, at 16.

116. BD. OF IMMIGRATION APPEALS, BIA PRACTICE MANUAL § 2.7 (July 27, 2015), <https://www.justice.gov/eoir/file/431306/download> [<https://perma.cc/5PW4BSE3>].

117. BD. OF IMMIGRATION APPEALS, BIA PRACTICE MANUAL §§ 2.5(b)–(c), 2.9(a) (2015), <https://www.justice.gov/eoir/file/431306/download> [<https://perma.cc/5PW4BSE3>].

118. Prior to January 18, 2017, the Board of Immigration Appeals oversaw the partial and full accreditation of representatives and the recognition of organizations. See generally Office of the Federal Register, *Recognition of Organizations and Accreditation of Non-Attorney Representatives* (Dec. 19, 2016), <https://www.federalregister.gov/documents/2016/12/19/2016-29726/recognition-of-organizations-and-accreditation-of-non-attorney-representatives> [<https://perma.cc/3B9H-C293>]; U.S. Executive Office for Immigration Review, *Recognition and Accreditation (R&A) Program*, DEP’T OF JUST., <https://www.justice.gov/eoir/recognition-and-accreditation-program> [<https://perma.cc/NGD2-S688>] (last visited Jan. 28, 2019); Office of Legal Access Programs, *GoToWebinar: Welcome to the New Recognition and Accreditation Rule* (Jan. 5, 2017) (notes on file with the author). The transfer of authority from

tial accreditation allows non-attorney representatives to practice solely before USCIS. Full accreditation allows non-attorney representatives to practice both before USCIS and in the immigration courts (EOIR)—essentially, to do the same work as an immigration attorney.

The accreditation process foists the vast majority of the work of determining an individual's suitability for accreditation on the non-profits. While OLAP does require proof of a certain amount and level of training, the real advantage of requiring that accredited representatives work at non-profits is that the non-profits themselves vet the candidates, thereby serving as a proxy for quality control.

Because an accredited representative must be employed by an OLAP-recognized organization,<sup>119</sup> we first turn to how an organization becomes "recognized." First, an agency must be a non-profit religious, charitable, social service, or similar organization.<sup>120</sup> Such an organization must also establish, among other things, that (1) it serves primarily low-income and indigent clients and has a written policy for accommodating clients unable to pay fees for immigration legal services;<sup>121</sup> (2) it is a Federal tax-exempt organization established in the United States;<sup>122</sup> and (3) it has at its disposal adequate knowledge, information, and experience.<sup>123</sup> Organizations file applications for recognition directly with the OLAP Director,<sup>124</sup> who also has the power to withdraw recognition if, after an investigation and special inquiry, it believes that an organization has failed to maintain the qualifications required.<sup>125</sup>

Once recognized by OLAP, an organization may apply for the accreditation of individuals working for it.<sup>126</sup> The individuals themselves may not apply for accreditation—the recognized organization must do it for them. Accreditation can be requested either for partial accreditation or full accreditation. Applications for accreditation must "fully set forth the nature

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the BIA to OLAP was prompted by a desire, among other things, to increase the number and quality of accredited representatives and to implement new disciplinary measures for those engaged in fraud and abuse. DOJ continues to search for ways to increase representation: earlier this year, DOJ solicited public comments on proposed rulemaking to allow the expansion of limited scope representation by attorneys and accredited representatives. *See* Executive Office for Immigration Review Docket No. 18-0301, 8 C.F.R. Parts 1003 and 1292 (2019). Former practitioners at non-profit immigration legal service organizations and current Clinical professors submitted public comments in support of proposed rulemaking. *See* Letter to Lauren Alder Reid, Assistant Dir., Office of Policy, EOIR, (Apr. 26, 2019) (on file with author) (submitting comments through the Federal eRulemaking Portal via <http://www.regulations.gov>).

119. 8 C.F.R. § 292.1(a)(4) (2016); *see also* 8 C.F.R. § 1292.1(a)(4) (2016).

120. 8 C.F.R. § 1292.11(a)(1) (2016).

121. *Id.*

122. 8 C.F.R. § 1292.11(a)(2) (2016).

123. 8 C.F.R. § 1292.11(a)(4) (2016).

124. 8 C.F.R. § 1292.13(a) (2016).

125. 8 C.F.R. § 1292.17 (2016).

126. 8 C.F.R. § 292.2(d) (2016); *see also* 8 C.F.R. § 1292.2(d) (2016).



and extent of the proposed representative's experience and knowledge of immigration and naturalization law and procedure and the category of accreditation sought," and the individual must possess good moral character.<sup>127</sup> The application may be approved in whole or in part, and the accreditation is valid only for three years before it must be renewed. Termination of accreditation occurs if OLAP ceases to recognize the sponsoring organization or if the representative ceases to be employed by the recognized organization.<sup>128</sup> This means that accreditation does not transfer with the individual: if an individual is employed as an accredited representative at Recognized Organization #1 and wishes to work as an accredited representative at Recognized Organization #2, then Recognized Organization #2 must file a separate, new application for accreditation for that same individual. Given the amount of time this can involve,<sup>129</sup> this results in much wasted time and therefore wasted resources when it comes to previously accredited representatives awaiting re-accreditation, or representatives with no employment mobility or choice.

Organizations seeking to accredit an employee are required to have "at their disposal" "adequate knowledge, information, and experience." The regulations define neither of these phrases, but an inspection of BIA decisions shows that organizations seeking recognition must demonstrate (1) the areas of immigration law in which they intend to practice; (2) the years of experience they possess; (3) years of education or training in the field; (4) resources available including libraries, publications, and training material; (5) their relationship to reputable immigration attorneys or law centers in their respective communities; and (6) their reputation in the community.<sup>130</sup> Individuals seeking accreditation must also demonstrate legal experience, training and knowledge in immigration law, and must be of good moral character.<sup>131</sup> In other words, it is possible some recognized organizations do not employ any immigration attorneys at all—just that they have a "relationship" to "reputable" ones.

Again looking at BIA decisions, we find that individuals seeking accreditation must also demonstrate good moral character and demonstrate legal experience, training, and knowledge in immigration law.<sup>132</sup> Anecdotal evidence suggests that accreditation—full accreditation in particular—is much more difficult to attain now than it was even ten years ago. For both organizational recognition and individual accreditation, the local US-

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127. 8 C.F.R. § 292.2(d) (2016); *see also* 8 C.F.R. § 1292.2(d) (2016).

128. 8 C.F.R. § 292.2(d) (2016); *see also* 8 C.F.R. § 1292.2(d) (2016).

129. 8 C.F.R. § 292.2(d) (2016); *see also* 8 C.F.R. § 1292.2(d) (2016).

130. Ashbrook, *supra* note 29, at 241. For a complete list of required supporting documents, see *Request for Recognition of a Non-Profit Religious, Charitable, Social Service, or Similar Organization*, U.S. DEP'T. OF JUST., <http://www.justice.gov/sites/default/files/pages/attachments/2015/07/24/eoir31.pdf> [https://web.archive.org/web/20160112215219/https://www.justice.gov/sites/default/files/pages/attachments/2015/07/24/eoir31.pdf]

131. Ashbrook, *supra* note 29, at 241.

132. *Id.*

CIS district director provides a recommendation for approval or disapproval and may request leave to conduct an investigation or otherwise obtain relevant information regarding the organization or the individual.<sup>133</sup> There is no rubber-stamping; both organizations and individuals are scrutinized to ensure they meet the narrow requirements under the regulations.

Unfortunately, the reported numbers of accredited representatives and recognized organizations are exceedingly small, and further examination reveals that those numbers are actually inflated by at least 13%. Currently, OLAP self-reports that 904 organizations are “recognized” by OLAP<sup>134</sup> and that only 1,967 individuals from those organizations are “accredited.”<sup>135</sup> In fact, a detailed look at the lists themselves reveal that the actual number of accredited individuals is actually 1,699, or 13.6% fewer than the reported number. The discrepancy appears to arise because the BIA—and now OLAP—double counts (or in some cases, triple or even quadruple counts) the same individual when that individual may divide her time between two offices of the same recognized organization. In other instances, individuals were counted more than once when they had application renewals pending before the BIA (prior to the rule change on January 18, 2017, recognition and accreditation was overseen by the BIA).

But even that 1,699 figure likely is not accurate: this author has personal knowledge of at least two individuals, still listed as accredited representatives,<sup>136</sup> who no longer work for the listed organizations (and have not for more than one year in one case, and more than three years in the other case). That fact underscores a second way in which OLAP has foisted its responsibilities in this area onto the recognized organizations. Although OLAP’s accredited representatives roster states at the top that the Program Coordinator for the Recognition & Accreditation Program “maintains a roster of recognized organizations and accredited representa-

133. 8 C.F.R. §§ 292.2(b), (d) (2016); *see also* 8 C.F.R. §§ 1292.2(b), (d) (2016).

134. U.S. DEP’T OF JUST., RECOGNIZED ORGANIZATIONS AND ACCREDITED REPRESENTATIVES ROSTER (2018), <https://www.justice.gov/eoir/page/file/942301/download> [<https://web.archive.org/web/20180904170901/https://www.justice.gov/eoir/page/file/942301/download>]. The number of recognized organizations is down from 1,028 in 2017 and 952 in 2015. *See* U.S. DEP’T OF JUST., RECOGNIZED ORGANIZATIONS AND ACCREDITED REPRESENTATIVES ROSTER (2015), <http://www.justice.gov/sites/default/files/pages/attachments/2015/08/31/raroster-orgs-reps.pdf> [<https://perma.cc/G28K-7SX9>].

135. U.S. DEP’T OF JUST., ACCREDITED REPRESENTATIVE ROSTER (2018), <https://www.justice.gov/eoir/page/file/942311/download> [<https://perma.cc/E5QE-STWJ>]. The number of accredited representatives was 1,777 in 2015, which was inflated by at least 15%: the number of accredited individuals in 2015 was actually 1,496, or 15.8% fewer than the reported number. *See* U.S. DEP’T OF JUSTICE, ACCREDITED REPRESENTATIVE ROSTER (2015), <http://www.justice.gov/sites/default/files/pages/attachments/2015/08/31/raroster-reps.pdf> [<https://perma.cc/UDJ7-LZU6>].

136. As of August 31, 2015. *See* ACCREDITED REPRESENTATIVE ROSTER (2015), *supra* note 135.

tives,”<sup>137</sup> it then adds the disclaimer that “while the Office of Legal Access Programs makes available the most current information provided to our Program Coordinator, it is the responsibility of each recognized organization to keep the Office of Legal Access Programs’ posted information up to date.”<sup>138</sup> Thus, not only do the current regulations conduct quality control of accredited representatives by proxy, but also OLAP surrenders even its simple duty to keep reliable records of who is an accredited representative to the recognized organizations (which already tend to be overworked and understaffed).<sup>139</sup> As the author’s personal experience demonstrates, plainly it is possible that an organization does not do so.

The reported number of recognized organizations is also misleading, though perhaps in a less important way: OLAP requires organizations with more than one physical office to apply separately for recognition of each office, leading to the misconception that 904 completely separate entities have been recognized by OLAP, when, for example, Catholic Charities had at least 169 affiliated offices that had been recognized (more than 17% of the total reported number in 2015).<sup>140</sup> Catholic Charities for the Diocese of Fort Worth alone, for example, has recognized offices in Arlington, Wichita Falls, Fort Worth at 241 West Thornhill Drive, and Fort Worth at 249 West Thornhill Drive. One of its five accredited representatives is listed four times, once for each recognized office.<sup>141</sup> A large percentage of recognized organizations—almost 27%—presently employ zero accredited representatives.<sup>142</sup>

#### V. LIMITED LICENSING FOR NOTARIOS: THE NEW MODEL

While the concept of recognizing organizations and accrediting representatives is sound, the execution of OLAP’s “recognition and accreditation program” is poor when it comes to meeting the need for immigration legal services or preventing *notario* fraud.

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137. ACCREDITED REPRESENTATIVE ROSTER (2018), *supra* note 134.

138. *Id.*

139. For a further discussion on accredited representatives and recognized organizations, see *supra* notes 95–133 and accompanying text.

140. See U.S. DEP’T OF JUSTICE, ACCREDITED REPRESENTATIVE ROSTER (2015), *supra* note 134.

141. RECOGNIZED ORGANIZATIONS AND ACCREDITED REPRESENTATIVES ROASTER (2018), *supra* note 134.

142. See RECOGNIZED ORGANIZATIONS AND ACCREDITED REPRESENTATIVES ROASTER (2015), *supra* note 134. Of the 952 recognized organizations in 2015, 256 reported employing zero accredited representatives. Another interesting area of inquiry would be an analysis of the location of each recognized organization and whether they were simply in or close to metropolitan areas and whether they actually reached into immigrant communities. Further analysis is required to determine the current percentage of recognized organizations that employ zero accredited representatives, in particular because OLAP relies upon the organizations to self-report.

Scholars and practitioners have generally derided the concept and practice of accredited representatives, arguing that expanding accreditation is not the answer to the problem of unmet need for legal services. Wary that accredited representatives contribute to the broad UPL problem in the immigration field and that we lack the enforcement follow-through required to adequately protect persons seeking services,<sup>143</sup> scholars have focused on how to solve the problem of the unauthorized practice of law and not how to meet the need for legal services in immigration. Rather than seeing the good to come from this category of non-attorneys, any discussion surrounding meeting the need for legal immigration services generally centers around increasing the number of attorneys available to non-citizens in removal proceedings before the EOIR.<sup>144</sup>

But what about the millions of people not in removal proceedings who seek immigration assistance? And focusing strictly on increasing the number of immigration attorneys implies that only attorneys are capable of providing competent legal services.<sup>145</sup> Given the prevalence of the unauthorized practice of immigration law, any attempt to broaden the field of non-attorneys in this field must proceed with caution. But why not harness an existing resource—*notarios*—by strengthening and expanding accreditation by the Office of Legal Access Programs?

Under this new regulatory scheme, would-be *notarios* could be granted a limited license to practice before USCIS. OLAP would allow for partial accreditation not only for candidates who are employed by non-profits, but also those who work for private attorneys and, most importantly, for those who are self-employed. As the regulatory body, OLAP could come up with a system, not unlike many states' bars (or even specialty bars), of requiring a certain amount of training, a licensure exam, adherence to a code of ethics, and continuing education each year to keep the accreditation. In exchange, the *notarios*-turned-accredited representatives would be able to state that they are accredited by the DOJ and, in essence, practice immigration law without fear of prosecution.

#### A. *Strengthening and Expanding the Recognition & Accreditation Program*

What would it look like to expand OLAP's recognition and accreditation program? What would it mean to have robust regulation of the process? While the requirement that an individual seeking accreditation

143. See generally Ashbrook, *supra* note 29, at 242; Moore, *supra* note 31, at 32.

144. See generally Corcoran, *supra* note 39; IMMIGRANT JUST. CORPS, *supra* note 8; Katzmman, *supra* note 8.

145. The American Bar Association acknowledges that attorneys alone cannot address the great demand for affordable legal services. See Commission on the Future of Legal Services, REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 8–9 (Am. Bar Ass'n 2016). The ABA even points to Limited Licensed Legal Technicians and authorized agents of federal agencies such as DOJ accredited representatives as being innovative methods that may assist in meeting the need for affordable legal services. *Id.* at 18–24.

should possess good moral character should stay in place, I propose a number of changes to the regulations:

- (1) Eliminate the requirement that an accredited representative can only be employed by a recognized organization;
- (2) Eliminate the requirements regarding serving low-income and indigent clients and tax-exempt status and replace it with a “reasonable fee” rule;
- (3) Education:
  - a. Require an initial core group of classes and/or trainings;
  - b. Require ongoing, annual “CLE”-type trainings;
  - c. Require individuals to pass an accreditation exam;
- (4) Accountability:
  - a. Require adherence to a code of ethics;
  - b. On the EOIR website, list not only who is an accredited representative, but also who has a pending complaint and who has been disciplined;
  - c. On the EOIR website, maintain public records of final disciplinary orders;
  - d. Require malpractice insurance; and
- (5) Require USCIS and EOIR officials inform applicants and respondents that only attorneys or OLAP-accredited representatives are lawful representatives in immigration proceedings.

In combination, what do these changes mean? First, accountability: the accredited representatives should be required to adhere to an ethical code. EOIR has implemented a Professional Conduct for Practitioners, but OLAP should reassess this regulation and bring it up to par with other legal programs’ codes of conduct.<sup>146</sup> In particular, rules regarding confidentiality would be imperative for an accredited representative to adhere to, but these are missing from the existing regulation.

Currently, OLAP does not track—or, at best, does not publicly reveal—which accredited representatives have been disciplined. But we do know that it happens.<sup>147</sup> These changes would require OLAP to begin holding accredited representatives accountable in much the same way as attorneys. OLAP would maintain a list of previously disciplined accredited

146. See *supra* notes 52, 64–65, and 83 and accompanying text. Of course, consulting the ABA’s Model Rules of Professional Conduct is a good place to start as well.

147. For an account of the most infamous disciplinary case of a BIA accredited representative, see Shannon, *supra* note 13, at 454–55. Father Bob, a Catholic priest in Brooklyn, became an accredited representative in the 1970s, even receiving the Meritorious Public Service Award from the DOJ in 1995 for his representation of indigent immigrants in the New York area. But in 2011, the BIA decided to strip him of accreditation, referencing his overwhelming caseload as well as specific instances of neglect, including 221 hearings in immigration court for which he either failed to appear or appeared but was unprepared. Shannon, *supra* note 13, at 454–55.

representatives, much in the same way as it maintains a list of sanctioned attorneys.<sup>148</sup> Furthermore, all accredited representatives, like attorneys, would be required to carry malpractice insurance.

Second, education: this is an area in which OLAP has overly-relied upon the screening of non-profit organizations to determine an individual's suitability for accreditation. These changes bring that responsibility—and therefore robust regulation—back into the hands of OLAP. Indeed, requiring immigration-specific training or coursework would work exceedingly well in this field. In this manner, one can get at the parts of this field that are the most complex and difficult; for example, one could take an extended “crimmigration” training and learn about the intersection of criminal law and immigration law, or one could take a training on the evolving meaning of “membership in a particular social group” in asylum law. Ultimately, a highly regulated corps of accredited representatives is likely to be more qualified to practice immigration law than any random sampling of licensed U.S. attorneys. These accredited representatives are likely to become such specialists that they will be far more qualified than most recent law graduates and even many seasoned attorneys.

Third, livelihood: the only way *notarios* and others will be attracted to becoming an accredited representative is if one can actually make a living out of it. By eliminating the requirement that only OLAP-recognized organizations may employ accredited representatives, we open up the door for anyone to have the ability to become eligible and apply for accreditation. On top of that, the proposed changes call for accredited representatives to be able to charge “reasonable fees” rather than simply “nominal fees.” While the language regarding “nominal fees” was removed in the most recent rulemaking, it was replaced with language that similarly requires that a recognized organization not charge at a rate that could sustain its operations on fees alone; indeed, its fees “are expected to be at a rate meaningfully less than the cost of hiring competent private immigration counsel in the same geographic area.”<sup>149</sup>

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148. OLAP—and the BIA before it—recognizes that bad lawyering does exist. On the EOIR website, a list of currently disciplined practitioners as well as a list of previously disciplined practitioners is available for public review, including links to PDFs of any final disciplinary or reinstatement orders. A quick perusal discovers 799 attorneys currently being disciplined, with an additional 152 attorneys making the “previously disciplined” list. *List of Currently Disciplined Practitioners*, EXECUTIVE OFFICE FOR IMM’N REV., <http://www.justice.gov/eoir/list-of-currently-disciplined-practitioners> [https://perma.cc/4BUP-VJTX] (last updated Dec. 18, 2018); *List of Previously Disciplined Practitioners*, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, <http://www.justice.gov/eoir/list-of-previously-disciplined-practitioners> [https://perma.cc/44A5-ZDNE] (last updated Apr. 27, 2018).

149. Recognition of Organizations and Accreditation of Non-Attorney Representatives, 80 Fed. Reg. 59,514, 59,519 (Oct. 1, 2015); *see also* Recognition of Organizations and Accreditation of Non-Attorney Representatives, 81 Fed. Reg. 92,346 (Dec. 19, 2016) (to be codified at 8 C.F.R. pt. 1001, 1003, 1103, 1212, and 1292). With the rule change that went into effect on January 18, 2017, the former requirement that recognized organizations make only nominal charges and asses no excessive membership dues for persons given assistance was eliminated. *See* 8 C.F.R.

The question of what exactly are “nominal fees” is a question that has certainly come up before. In its 2014 *Matter of Ayuda* decision, the BIA addresses this very question, and the new rule that followed is clearly based on this decision.<sup>150</sup> The answer is that it depends—but it most likely means that an organization cannot solely rely on client fees. The BIA stated in its decision that it makes the determination of nominal fees on a case-by-case basis, and this determination is entirely dependent on the circumstances of the organization seeking recognition.<sup>151</sup> In determining whether an organization charges nominal fees, the BIA considers geography; client demographics; availability of services; local overhead costs for service providers; the actual costs to provide the services in the applicant’s geographic area; the organization’s policy for waiving fees, adjusting fees, and assessing fees; and a myriad of other factors.<sup>152</sup> According to the BIA, “The fee structure must be true to the goal of providing competent low-cost legal services and may not be designed simply for the purpose of financially sustaining or serving the interests of the organization.”<sup>153</sup> In a decision released the same day, the BIA denied organization recognition to an agency that is associated with a for-profit organization, underscoring that “[t]he organization must affirmatively demonstrate that its immigration services are not part of a larger commercial enterprise and do not act as a loss leader for for-profit services or serve in any other way as a façade or conduit for a business venture.”<sup>154</sup> These two decisions emphasize that, under current regulations, OLAP recognized organizations and accredited representatives are not intended to charge fees in order to make a profit. On the contrary, organizations almost surely must demonstrate other sources of financial support.

Making the change to “reasonable” fees means that people can actually earn a living. This, in combination with (1) both USCIS and EOIR officials underscoring that immigrants should only seek representation by accredited representatives or licensed attorneys and (2) eliminating the requirement that an accredited representative can only be employed by a recognized organization, is the real thrust behind making “accredited representative” a viable career option.

#### B. *Advantages of Licensing Notarios*

Harnessing *notarios* as a resource produces a number of advantages: increasing immigration legal services, increasing system efficiencies, and decreasing consumer fraud.

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§ 1292.2(a)(1) (2014). *But see* Recognition of Organizations and Accreditation of Non-Attorney Representatives, 81 Fed. Red. at 92,346.

150. *Matter of Ayuda*, 26 I&N Dec. 449 (B.I.A. 2014).

151. *Id.* at 450–51.

152. *Id.* at 452–53.

153. *Id.* at 451.

154. *Matter of St. Frances Cabrini Immigration Law Ctr.*, 26 I&N Dec. 445, 447 (B.I.A. 2014).

One of the biggest advantages of licensing and regulation is the effect they have on behavior. One worst-case scenario of *notario* fraud is the case where one *notario*'s actions lead to an immigrant's removal from the United States and, therefore, a forced and long-term or permanent separation from his or her family and loved ones. This, in general, occurs only after a ruling by a judge in immigration court. With partial accreditation, the key would be to train and license a large number of representatives who are competent and able to handle a case such that mistakes are not made that would lead an immigrant into removal proceedings. Indeed, the majority of the focus on the problem of lack of legal representations for immigrants has been on representation for those who are already in removal proceedings.<sup>155</sup> In other words, one aim of the regulation of *notarios* is to help catch or prevent small issues before they become much larger problems.

Ultimately more high-quality representation leads to efficiencies—and therefore cost-saving—for the entire system. More non-citizens represented in removal proceedings mean fewer continuances, meaning that immigration judges may be able to move through their overflowing dockets<sup>156</sup> more quickly, as well as fewer failures to appear.<sup>157</sup> Additionally, high quality representation before USCIS means that USCIS officers may issue fewer Requests for Evidence (because the representatives submitted the right evidence the first time around), again leading to time-saving. More high-quality representation means that fewer fatal mistakes will be

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155. See, e.g., Ella Nilsen, *There Aren't Enough Immigration Lawyers to Handle the Family Separation Crisis*, Vox (June 21, 2018), <https://www.vox.com/2018/6/21/17479030/immigration-courts-lawyers-trump-family-separation-policy>. For further discussion on immigrant defense funds see also *supra* notes 96–103.

156. As of March 2019, there are over 869,000 pending cases in U.S. immigration courts. *Backlog of Pending Cases in Immigration Courts as of March 2019*, TRAC IMMIGRATION, [http://trac.syr.edu/phptools/immigration/court\\_backlog/apprep\\_backlog.php](http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php) [<https://perma.cc/7KAH-GG2L>] (last visited Apr. 30, 2019).

157. Eagly and Shafer's national study provides a long-awaited empirical analysis focusing on the relationship between attorney representation and court adjudication times, finding efficiencies in court continuances to find counsel, litigation patterns in represented cases, release from detention, and failures to appear. See Eagly & Shafer, *supra* note 7, at 58–71. That legal representation speeds up court proceedings is not a new theory. See Lenni B. Benson & Russell R. Wheeler, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, ENHANCING QUALITY AND TIMELINES IN IMMIGRATION REMOVAL (June 7, 2012), at 56, <https://www.acus.gov/sites/default/files/documents/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-7-2012.pdf> [<https://perma.cc/W5K6-XC6T>] (surveying immigration judges in 2011, who almost unanimously agreed that they can adjudicate cases “more efficiently and quickly” when the respondent “has a competent lawyer”); John D. Montgomery, NERA ECONOMIC CONSULTING, COST OF COUNSEL IN IMMIGRATION: ECONOMIC ANALYSIS OF PROPOSAL PROVIDING PUBLIC COUNSEL TO INDIGENT PERSONS SUBJECT TO IMMIGRATION REMOVAL PROCEEDINGS (May 28, 2014), at 3, [http://www.nera.com/content/dam/nera/publications/archive2/NERA\\_Immigration\\_Report\\_5.28.2014.pdf](http://www.nera.com/content/dam/nera/publications/archive2/NERA_Immigration_Report_5.28.2014.pdf) [<https://perma.cc/7QC3-NALK>] (concluding that providing appointed counsel for immigrants in removal cases could pay for itself).



made that might lead a non-citizen to be placed in removal proceedings in the first place.

Efficiency in combatting *notario* fraud is a vital aspect to any licensing program. Regulation of non-attorney immigration practitioners, while difficult to set up initially, is a better overall scheme to help vulnerable immigrants access justice than by prosecution of UPL alone. Prosecution can really only target the most egregious cases.<sup>158</sup> With regulation, we target the bulk of cases in which non-attorneys are assisting in immigration matters. This expanded regulatory scheme encourages *notarios* to come out of the woodwork and out of the shadows and discourages would-be *notarios*.<sup>159</sup>

Furthermore, non-attorneys cost less than private attorneys.<sup>160</sup> If we are targeting the middle ground—neither the very rich, nor the very poor who qualify for services at non-profits—then accredited representatives under this new scheme likely fit the bill. These accredited representatives, especially once promoted as a profession by the USCIS and EOIR, would certainly get enough business. And at the end of the day, we would end up with a lot more licensed, knowledgeable immigration representatives.

### C. Challenges of Licensing Notarios

Strengthening and expanding OLAP accreditation comes with costs. These include implementation and administrative costs as well as representation costs.

In order to set up the new accreditation system, OLAP would likely want to set up a committee to determine the details of the education and testing components: what types of classes or trainings to require initially, what types of trainings to require annually, the core competencies that representatives must possess, and what a code of ethics for the profession should consist of. OLAP can model its committee off the Washington State Limited License Legal Technician Board, though that board was developed on a smaller scale.<sup>161</sup> Once the education component is set, the administrative costs to maintain the system come into play. Accountability factors, such as maintaining lists of disciplined accredited representatives, should result in a minimal rise in cost, if any. But administratively ensur-

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158. Moore, *supra* note 31, at 5–11, 32.

159. This article does not explore other UPL-avoidance methods (e.g., increased prosecution, increased vigilance for *notario* advertisement), except promotion of this group by USCIS and EOIR. However, these methods are essential to ensuring that bad faith *notarios* either cease UPL or reform under this new program, rather than continue to steal money from and endanger the statuses of immigrants.

160. Moore, *supra* note 31, at 3 (explaining “the most significant factor is a lack of reasonably affordable and accessible legal services. Immigration consultants and notarios are seen as a less expensive alternative to attorneys.”).

161. WASH. R. ADMIS. APR 28(C), [http://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.display&group=GA&set=APR&ruleid=GAApr28](http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=GA&set=APR&ruleid=GAApr28) [Permalink unavailable].

ing that accredited representatives obtain malpractice insurance and undergo the requisite training will result in some cost. OLAP will shoulder these implementation and administrative costs.<sup>162</sup>

This proposal does not call for free immigration legal services. Instead, it calls for an expanded class of non-attorney representatives from which immigrants can obtain competent immigration legal services. The cost of representation, then, ultimately will be borne by the immigrants themselves.<sup>163</sup>

Some might argue that extending accreditation and increasing regulation by OLAP will be expensive. This is true. But so are other programs to increase the number of immigration attorneys. This expanded regulatory scheme for limited licensing of non-attorney immigration practitioners involve changes that will necessitate heavy regulation on the part of OLAP in a way not unlike state bars<sup>164</sup> or the federal patent bar.<sup>165</sup> But if

162. Perhaps there may be some ways in which OLAP can use the accreditation process to generate revenue. OLAP may wish to explore accreditation fees, much like state bar associations charge fees to their members. Along the same lines, OLAP may charge fees for any required examinations of competency or ethics. Additionally, while there will be significant up-front costs associated with establishing this program, expanding immigration representation and limiting instances of fraud will promote efficiency and limit resource waste. Washington State's LLLT program, still in its nascent stages, also acknowledges that "[t]he regulatory costs of the program are not yet close to breaking even, but scaling up the program significantly would resolve that issue." See THOMAS M. CLARKE & REBECCA L. SANDEFUR, PRELIMINARY EVALUATION OF THE WASHINGTON STATE LIMITED LICENSE LEGAL TECHNICIAN PROGRAM 3, 9–13 (2017), [http://www.americanbarfoundation.org/uploads/cms/documents/preliminary\\_evaluation\\_of\\_the\\_washington\\_state\\_limited\\_license\\_legal\\_technician\\_program\\_032117.pdf](http://www.americanbarfoundation.org/uploads/cms/documents/preliminary_evaluation_of_the_washington_state_limited_license_legal_technician_program_032117.pdf) [<https://perma.cc/3MNK-QWTM>].

163. One scholar proposes to create a federal grant to fund legal services for immigrants. See generally Corcoran, *supra* note 39. Yet federal regulations prohibit Legal Services Corporation grantees from serving undocumented immigrants, with a few exceptions for victims of domestic violence, sexual assault, and severe human trafficking. See 45 C.F.R. § 1626 (2014). Overcoming the knee-jerk reaction against providing any funds to undocumented immigrants may cost a lot of political capital.

164. See, e.g., *Admissions and Educational Standards*, CAL. BAR (2007), [http://www.calbar.ca.gov/Portals/0/documents/rules/Rules\\_Title4\\_Div1-Adm-Prac-Law.pdf](http://www.calbar.ca.gov/Portals/0/documents/rules/Rules_Title4_Div1-Adm-Prac-Law.pdf) [<https://perma.cc/MRR4-7R4V>] (listing the requirements for admission to the California State Bar); Anthony J. Granieri & Hilary McHugh, *Are You In or Are You Out?: The Effect of a Prior Criminal Conviction on Bar Admission & A Proposed National Uniform Standard*, 26 HOFSTRA LAB. & EMPL. L.J. 223, 236–41 (2008) (examining how the California State Bar and New York State Bar consider prior criminal convictions in their decisions to admit attorneys into the bar). See generally Dina Epstein, *Have I Been Googled?: Character and Fitness in the Age of Google, Facebook, and YouTube*, 21 GEO. J. LEGAL ETHICS 715 (2008) (discussing how the advent of technology and social media has affected state bars' examinations of applicants' character and fitness).

165. *General Requirements Bulletin for Admission to the Examination for Registration to Practice in Patent Cases Before the United States Patent and Trademark Office*, U.S. PATENT AND TRADEMARK OFFICE, OFFICE OF ENROLLMENT AND DISCIPLINE (Oct. 2018), [https://www.uspto.gov/sites/default/files/documents/OED\\_GRB.pdf](https://www.uspto.gov/sites/default/files/documents/OED_GRB.pdf) [<https://perma.cc/6T2T-9XNP>].

we are truly attempting to address both *notario* fraud and the need for immigration legal services, then there must be serious changes to the system as it now exists.

In expanding the accredited representative program to license non-attorneys outside of nonprofit organizations, OLAP must regulate how these representatives advertise their services. Much of the confusion surrounding *notarios* stems from the word's meaning in English, which is "notary." In choosing a title for these non-attorney representatives, OLAP will need to ensure that it cannot be misconstrued in translations or similarities to foreign language words. OLAP will likely need to work with states to encourage regulations on how these services may be advertised. In recognizing the confusion caused by the words "notary public" and "*notario público*" in immigrant communities, some states have regulated how businesses may use these words.<sup>166</sup> Unless OLAP requires that accredited representatives advertise their services using specific words in English and foreign languages and encourages states to expand their regulation of legal services advertising, this program could cause additional confusion in immigration communities and offer additional opportunities for nefarious individuals to take advantage of the confusion.

## VI. CONCLUSION

With many scholars urging caution in the event of any attempt to broaden the field of non-attorneys in the immigration field, particularly due to the prevalence of the unauthorized practice of immigration law, at this time I only propose to expand the number of those who could qualify for practice before USCIS, or partial accreditation. After an initial trial period of, say, five years, OLAP could revisit this accreditation expansion and further broaden it to include full practice before EOIR. At that time, OLAP could call for a trial practice class or training program as one of the requirements to attain full accreditation.<sup>167</sup> In the meantime, OLAP can still retain the original Recognition and Accreditation Program for representatives who are employed by recognized organizations—for them, both partial and full accreditation would remain available.

Between expensive private attorneys and overworked non-profits, there is a large gap filled by non-attorney immigration practitioners. These *notarios* constitute a huge underground industry that must be

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166. Florida prohibits non-attorney notaries from translating the words "Notary Public" into any language other than English for advertisement purposes. FLA. STAT. ANN. § 117.05(11) (West 2017). Massachusetts also prohibits non-attorney notaries from using the terms "licensed" or "notary public" in languages other than English to imply that the notary is an attorney. MASS. GEN. LAWS ANN. ch. 222, § 17(a) (West 2016).

167. Some critics are concerned that non-attorneys do not have the trial skills necessary to appear in court. But neither do many attorneys. Trial skills classes are not required in law school, and these skills are generally acquired through practice.

brought to the surface.<sup>168</sup> Robust commitment to regulation by OLAP and the expansion of partial accreditation tackle the problem of consumer fraud while plugging the gaping hole in immigration legal services and providing access to justice to immigrants in the United States.

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168. Of course, not all *notarios* will heed the call to become accredited, and not all *notarios* would qualify to become accredited. Any discussion of regulating *notarios* would be fruitless if the plan is not palatable to the *notarios* themselves. An extension of this project will undertake a qualitative study of *notarios* to discover, among other things, what they would be willing to do to obtain a license; whether they are concerned about UPL and getting “caught”; and whether they see licensure as a positive for their careers.

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